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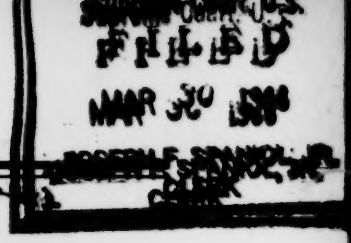

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

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March 30, 1988

QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application thereof denying utility investors any recovery of or on investment in electric generating plant fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

PARTIES BELOW

The petitioner below was Public Service Company of New Hampshire ("PSNH"). The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

STATEMENT PURSUANT TO RULE 28.1

Public Service Company of New Hampshire has no parent and no publicly held affiliates or subsidiaries.

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IN THE

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No. ____

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

JURISDICTIONAL STATEMENT

Public Service Company of New Hampshire appeals from the final judgment of the Supreme Court of New Hampshire, dated January 26, 1988, holding that N.H. Rev. Stat. Ann. § 378:30-a does not violate the Fifth and Fourteenth Amendments to the United States Constitution when applied to the fixing of electric utility rates even in the face of a financial emergency of the utility.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (130 N.H. ____, ____ A.2d ____ (January 26, 1988)) (Appendix ("App.") A) is not yet officially reported. The Report and Order of the New Hampshire Public Utilities Commission ("PUC" or the "Commission") on remand dated March 24, 1988 is at App. B. The Report and Order No. 18,788 (initial transfer order) of the PUC (August 11, 1987) is at App. C. The

Order of the Supreme Court of New Hampshire deferring acceptance of the transferred questions and dated September 2, 1987 is at App. D. The PUC's fact-finding Report and Order No. 18,873 (October 14, 1987) and Report and Order No. 18,890 (November 2, 1987) are at App. E and F, respectively. The PUC's transfer of a third question (November 5, 1987) is at App. G. The Order of the Supreme Court of New Hampshire accepting the transfer and dated November 4, 1987 is at App. H. The New Hampshire Supreme Court's Order accepting the third question for transfer and dated November 17, 1987 is at App. I. App. J is *Public Service Co.*, 65 N.H.P.U.C. 45 (1980), a decision cited by the New Hampshire Supreme Court in the decision appealed from. App. K is a copy of the Notice of Appeal filed in the Supreme Court of New Hampshire on March 25, 1988.

JURISDICTION

The Supreme Court of New Hampshire entered judgment on January 26, 1988 and remanded the proceeding to the New Hampshire Public Utilities Commission, which dismissed the proceeding on March 24, 1988. Public Service Company of New Hampshire filed a timely notice of appeal in the Supreme Court of New Hampshire on March 25, 1988. This appeal is being docketed within 90 days of the judgment below. This Court has appellate jurisdiction under 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V, clause 4:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, clause 3:

"[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

N.H. Rev. Stat. Ann. § 378:30-a (1984):

> "*Public Utility Rate Base; Exclusions.* Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

STATEMENT OF THE CASE

On January 28, 1988 PSNH, New Hampshire's largest electric utility, became the first major public utility since the Depression to file for protection from creditors under the Bankruptcy Code. It should never have happened.

PSNH is the largest single owner (35.6%) of the Seabrook Nuclear Generating Station ("Seabrook Station" or "Seabrook"). Seabrook has been physically complete since October 1986, but has not been placed into service because it has not received operating authority from the United States Nuclear Regulatory Commission. A confluence of forces—judicial, legislative, regulatory, political and economic—all related to PSNH's investment in Seabrook Station, resulted in PSNH's inability to support that investment through access to financial markets, to pay equity investors any return on investment, and ultimately, to service the debt it had incurred in an attempt to meet its statutory obligation to supply electricity to the people of New Hampshire. At the root of the problem is the New Hampshire statute which bars rates or charges based upon "Construction Work In Progress," the so-called "anti-CWIP" law, N.H. Rev. Stat. Ann. § 378:30-a, enacted effective May 7, 1979, which, according to the Supreme Court of New Hamp-

shire, "simply forbids return on or recovery of investments through utility rates before the project is completed and providing service to customers." *Petition of Public Service Co.* (App. A at 9a).[1]

As part of PSNH's response to its extreme financial crisis, PSNH sought an emergency rate increase, expressly to avoid bankruptcy. It argued that the New Hampshire anti-CWIP law is unconstitutional as applied under the circumstances, because the law would deprive PSNH of its financial integrity, without a meaningful balancing as mandated by *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"), and without a hearing by the PUC to establish just and reasonable rates. The Supreme Court of New Hampshire disagreed, and both the bankruptcy and this appeal followed.[2]

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1 This appeal raises an issue very similar to that in a case in which this court recently noted probable jurisdiction, *Duquesne Light Co.* v. *Barasch*, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988) (No. 87-1160). In the *Duquesne* case, the Supreme Court of Pennsylvania interpreted that state's anti-CWIP statute to deny utility investors any recovery of or on prudently incurred investment in cancelled electric generating units and reversed the ratemaking agency's determination that an appropriate balancing of investor and consumer interests required recovery of such investment. That court determined that the "used and useful" ratemaking concept was of constitutional dimension.

The utilities in *Duquesne* have argued that the Pennsylvania anti-CWIP statute is unconstitutional on its face. PSNH argues that New Hampshire's statute is unconstitutional as applied, since its present rates are confiscatory in failing to provide for its financial integrity. Thus, while a favorable ruling by this Court on the merits of the Pennsylvania utilities' appeal will certainly also necessitate a reversal of the decision by the New Hampshire Supreme Court, it is important to note that even were this Court to find that anti-CWIP laws such as these may, under some circumstances, pass constitutional muster, the application of the New Hampshire anti-CWIP law would still be unconstitutional as applied to PSNH.

2 The New Hampshire court's ruling left PSNH without hope of an emergency rate increase, and left it with no recourse other than to seek protection from creditors under Chapter 11 of the United States Bankruptcy Code (*see* Case No. 88-00043, U.S. Bankruptcy Court for the District of New Hampshire). On March 24, 1988 the PUC—

(*Footnote continued on next page*)

PSNH is obligated by New Hampshire statute to supply adequate electric power to its service area. N.H. Rev. Stat. Ann. § 374:1 (1984).[3] This statutory obligation to serve includes the provision of sufficient amounts of electricity to meet whatever demand is needed, an obligation commonly found in public utility statutes nationwide. In order to provide sufficient capacity to meet that obligation, in 1972 PSNH commenced planning and construction of Seabrook Station.[4]

From the outset, Seabrook Station received strong regulatory support. The New Hampshire Public Utilities Commission granted a Certificate of Site and Facility for the Seabrook Project on January 29, 1974, which included a finding that the project was consistent with the public good. The Nuclear Regulatory Commission has reviewed the project's construction at various stages, and has acknowledged that it meets or exceeds the increasingly complex and stringent construction safety requirements that were imposed over its ten-year construction period. On May 12, 1981 the New Hampshire legislature, by joint resolution, supported the completion of both Seabrook units. Construction of Seabrook Station Unit One was completed in October, 1986. Since that time, the plant has been in regulatory limbo, unable to proceed to low power testing or full power operation due to opposition of Governor Dukakis and the Commonwealth of Massachusetts to evacuation planning and due to the activities of anti-nuclear special interest groups intervening before the NRC and elsewhere. At July 31, 1987,

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(*Footnote continued from previous page*)

although finding on the merits "that a financial emergency did and does exist" (App. B at 26a)—dismissed the emergency rate case, confirming that "[u]nder that supreme court opinion and the findings of fact made in this case, the commission lacks authority to grant PSNH a rate increase" (*id*).

3 "§ 374:1 Service. Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable."

4 PSNH originally owned 50% of the planned 2-Unit project. Today, PSNH owns 35.56942%. There are eleven other "joint owner" utilities in Connecticut, Massachusetts, New Hampshire and Vermont.

PSNH had invested approximately $2 billion in Seabrook, representing 69% of the Company's total assets.

During the early years of the project, PSNH sought to fund its then 50% share of the project through internally generated funds and regular borrowings. In 1977, PSNH sought to have included in its rate base a portion of its construction costs under the category of Construction Work In Progress ("CWIP").[5]

5 The New Hampshire PUC has explained the methodologies of financing construction concisely:

> "Any public utilities commission has in essence two ways of treating financing costs. The first method is to include CWIP in rate base. The account, construction work in progress (CWIP), is included in rate base and thereafter earns a return, which represents the financing costs of plant under construction. The rate-making effect of such treatment is to increase rate base and thereby increase the rates to present consumers. ***Because CWIP is added to rate base, the financing costs associated with construction are recovered currently.***" (Emphasis supplied.)
>
> "The second method is to exclude CWIP from rate base. The financing costs incurred during construction, AFUDC (allowance for funds used during construction), are accumulated, capitalized, and charged to the utility's CWIP account, together with other costs associated with construction. When the plant begins to actually generate electricity (in the case of an electric utility's generating plant) the rate base *then and only then* includes the total labor and materials costs, as well as the accumulated AFUDC (financing costs). At this time of actual generation, the company earns a rate of return on the AFUDC and recoups the same by depreciation." *Public Service Co.*, 65 N.H.P.U.C. 45, 48 (1980) (emphasis in original; citation omitted) (appended hereto as App. J).

Rejection of the CWIP method means that both construction costs and financing costs associated therewith must be borne entirely by investors in the first instance. Thus, investors must furnish not only the cash for additional "bricks and mortar," but also the cash to compensate earlier investors for previously-raised construction cash, until the construction is complete and in service. This continuing cycle of financing results in geometric increases in the need for external funds, due to the effects of compounding. If access to financial markets fails, the utility loses access not only to sources of additional construction cash, but also to sources of cash to pay finance charges on the investment in incomplete construction. By definition, the utility is not permitted current rates to meet those finance charges and, in the absence of any other source of cash, the utility will, in time, become unable to meet its obligation to pay finance charges in addition to its operating costs, resulting in financial impairment, and eventually collapse.

This would permit PSNH to gain a return on its construction investment through rates and thereby to support the financing costs associated with that investment.

By order of the PUC dated May 25, 1978 (Order No. 13,162), PSNH was permitted to include a portion of CWIP in its rate base, which was upheld by the Supreme Court of New Hampshire in *Legislative Utility Consumers' Council* v. *Public Service Co.*, 119 N.H. 332, 402 A.2d 626 (1979) ("*LUCC* v. *PSNH*").[6]

6 In *LUCC* v. *PSNH*, *supra*, the court rejected arguments that allowing CWIP investment in rate base either would result in rates which were not just and reasonable or was barred as not being "used and useful" under N.H. Rev. Stat. Ann. § 378:27 (1984). Instead, in discussing whether the inclusion of CWIP would be just and reasonable, the court said that the controlling question is " 'the *necessity*' of including CWIP in the rate base" (119 N.H. at 345, 402 A.2d at 635 (emphasis added)). The court appears to have defined "necessity" in terms of the financial integrity of the Company. Thus, the court concluded that the "most compelling testimony [of necessity] was that without CWIP in the rate base, the Company would 'teeter precariously on the brink of financial disaster.' " 119 N.H. at 350, 402 A.2d at 638. The court had previously stated:

> "We have held that a public utility must be given the opportunity to earn revenue 'sufficient to assure the investor's confidence in the financial soundness of the utility and enough to maintain and support its credit so that it will be able to raise money necessary to improve and expand its service' . . . . Because it is fundamental that ratemaking must take into account the need for the utility to maintain the confidence of investors, *Bluefield Water Works & Improvement Co.* v. *Pub. Serv. Comm'n*, 262 U.S. 679, 693, 43 S. Ct. 675, 67 L. Ed. 1176 (1923); *accord*, *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 88 L. Ed. 333 (1944), the Commission properly exercised its regulatory function by allowing the Company to prove the necessity of including its CWIP in the rate base." 119 N.H. at 345-46, 402 A.2d at 635.

Furthermore, in discussing the circumstances under which an investment in CWIP could be found to be "used and useful," the court stated:

> "The factual determination that the Commission had to make in its used and useful analysis was whether the Company's CWIP represents an expenditure incurred in raising capital to finance a reasonable construction program that will enure to the benefit of energy consumers by assuring a future supply of electricity." 119 N.H. at 344, 402 A.2d at 634.

However, effective May 7, 1979, the New Hampshire legislature enacted N.H. Rev. Stat. Ann. § 378:30-a (1984), the so-called New Hampshire anti-CWIP statute. The previously allowed CWIP was subsequently removed from PSNH's rate base and since that date, PSNH has been barred from any recovery either of or on its Seabrook investment.[7] Because the anti-CWIP law prohibits current return on construction investment, and because of the consequent effect of compounding of financing costs, the financial condition of PSNH was progressively weakened. It was forced to borrow, at increasingly higher rates, to finance its expenditures.

In the Spring of 1984, PSNH faced a major financial crisis. Its commercial bankers indicated a refusal to lend additional funds under PSNH's revolving credit agreement. Construction of Seabrook Station was suspended for a period of two-and-one-half months. PSNH was forced to suspend all dividends on common and preferred stock, which suspension remains in effect. Indeed, the PUC has prohibited payment of dividends without PUC approval. *Public Service Co.*, 69 N.H.P.U.C. 522, 540 (1984). PSNH was eventually able to borrow additional funds, at rates as high as 20 percent, in order to continue the project, to obtain cash necessary to pay interest on its outstanding debt and to meet its statutory obligation to supply electricity.

In the Spring of 1987, PSNH sought to raise $150,000,000 by issuance of floating rate notes, in order to pay for its operating expenses and debt service, but was unable to market the entire issue. It became obvious that PSNH's access to financial markets was foreclosed. In an attempt to stave off bankruptcy, PSNH commenced a three-pronged survival program which involved: 1) institution of further immediate and stringent cash conservation; 2) a plan for restructuring its outstanding debt;

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7 In utility parlance, return *of* investment is accomplished, generally, through amortization or depreciation charges while return *on* investment is realized through a rate of return on the amount of the investment in rate base. For a more detailed explanation *see* C.F. Phillips, Jr., *The Regulation of Public Utilities*, 281-377 (1984). Neither type of recovery is permitted under the New Hampshire anti-CWIP law.

and 3) a request for a 15 percent emergency rate increase, filed August 5, 1987, claiming an emergency rate base increment which would include some $464,000,000 (27%) of the Seabrook investment. At PSNH's rate of return, this would have provided some $70,000,000 per year in additional revenues. This amount would have provided less than 20 percent of the $366.6 million in additional annual revenues needed to service PSNH's debt from internal funds. The balance was to be met through the debt restructuring. The requested increase constituted the bare minimum needed to survive.

Because this emergency rate increase would implicate the strictures of the anti-CWIP law, at the same time PSNH also requested, pursuant to N.H. Rev. Stat. Ann. § 365:20 (1984), that the PUC certify the following question to the New Hampshire Supreme Court:

> "Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) Its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) Its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms; and
>
> (3) Accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity.
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called 'anti-CWIP' statute?" App. A at 3a.

In its Report and Order No. 18,788 (August 11, 1987, DR 87-151) (the Transfer Order) (App. C), the Commission granted PSNH's request, including in its transfer order PSNH's Application and affidavits in support thereof, and also transferred to

the New Hampshire Supreme Court the following additional question of law:

> "Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, notwithstanding the requirements of RSA 378:30-a?"

Following a prehearing evaluation conference, the New Hampshire Supreme Court ordered that acceptance of the transferred questions would be deferred until the Commission had addressed the following issues with findings of basic facts:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter.[8]

The PUC reported to the New Hampshire Supreme Court its findings of basic facts on those issues along with other findings in Report and Order No. 18,873 (October 14, 1987) and Report

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8 *See* App. D. The court noted: "The court does not sit as a fact-finding body on such a case transferred by the commission . . . . The court therefore requires the commission to make findings sufficient to provide a factual basis for transferred constitutional questions, when those questions rest upon specific factual claims." App. D at 44a. The court thus indicated that these were the only additional facts it needed to answer the certified questions.

and Order No. 18,890 (November 2, 1987) (App. E and F, respectively).[9] In particular, the PUC found that:

> "Based on the foregoing, the commission finds that to put PSNH in a position where it is reasonably likely to meet its cash obligations including making interest payments as they come due under current obligations, paying off existing debt as it matures and paying for expansion of services for customers, PSNH would need additional revenues from a rate increase. Such rate relief need not necessarily be provided by adding a portion of the company's investment in Seabrook I in the company's rate base; but one or more of the following three methodologies must be utilized under traditional ratemaking to provide such revenues: inclusion of construction work in progress in rate base, enhancement of expenses to reflect capitalization that exceeds the allowable rate base, or enhancement of the rate of return. As discussed above, *all such actions seem to violate the dictates of RSA 378:30-a and supreme court cases related thereto.*" App. E at 56a. (Emphasis added; footnote omitted).[10]

The New Hampshire Supreme Court heard argument on December 15, 1987 and issued its final decision on January 26, 1988. In that decision, the court ruled that the anti-CWIP law was not unconstitutional as applied, regardless of PSNH's financial condition. It never even mentioned PSNH's statutory obligation to provide power. The court simply reasoned that the New Hampshire legislature itself had undertaken the constitutionally mandated balancing in adopting the anti-CWIP statute, that the legislature had determined that the risk of loss

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9 In addition, on November 5, 1987, the PUC requested the New Hampshire Supreme Court to accept and determine a question of state statutory construction which is not an issue on this appeal. *See* App. G.

10 By this finding the PUC established factually that the rates PSNH was allowed to charge were confiscatory as defined in *Hope*, a finding which the New Hampshire Supreme Court specifically requested and then, as discussed, *infra*, effectively ignored.

from incomplete construction or delayed placement into service was to be borne entirely by the investor, and that this purported "balancing" satisfied the *Hope* requirements. App. A at 11a. The court, without benefit of factual support, and in apparent misconstruction of a PUC decision, concluded that PSNH investors presumably had been compensated for the resulting added risk through an "enhanced rate of return."

In actuality, what the New Hampshire court held was that PSNH is not even entitled to a *Hope* hearing to determine whether its proposed increase provides a just and reasonable rate under all the circumstances. This heavy thumb on the scale of *Hope* balancing is exactly what is forbidden by the Constitution. It is from this ruling that PSNH appeals.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. The Power to Regulate Is Not a Power to Destroy

Regulation of public utility rates rests on a theoretical basis that is often referred to as the "regulatory compact." This "compact" was first established in broad outline by this Court more than one hundred years ago in the *Railroad Commission Cases*, 116 U.S. 307, 345 (1886), where the potential for destruction from excessive regulation was fully recognized. Utility investors implicitly must surrender their potential ability to reap any windfall profits and their freedom to supply or not supply services to their customers, in return for a reasonable but locked-in margin of return set by state regulatory agencies.

A leading regulatory economist and former chairman of the Civil Aeronautics Board and of the New York Public Service Commission, Dr. Alfred H. Kahn, described the nature of the regulatory compact as follows:

> "The essential basis of public-utility regulation is an implicit bargain between consumers and investors that, in exchange for a monopoly franchise, the company accepts the strict legal obligation to serve all customers on reasonable terms. This means that shareholders accept a return on investment equivalent only to something like the market cost of capital—the minimum that investors must see a reasonable prospect of earning if they are to put up the necessary funds—along with the duty conscientiously to anticipate the future needs of the public and to make whatever investments may be necessary in order to meet them efficiently.
>
> "This means that if the company makes a particularly successful investment—and there have been many such—the lion's share of the benefit goes to the consumer. . . .
>
> "The other side of the bargain is, and has to be, that investors are permitted to earn that same minimum return also on the dollars that they put into investments that turn out sour. If they can earn the cost of capital only on the

successes and not on the failures, it follows that they will earn less than the cost of capital on all their dollars, taken together. And investors won't play that game once they understand that those are going to be the rules.

"That does not mean consumers have to bear the costs of grossly imprudent ventures; that is the justification for public utility commissions determining the prudency of utility investments. No investors can legitimately expect that. But the only test of prudence consistent with the regulatory bargain has to be as of the time the commitments were made." Kahn, "Who Should Pay for Power-Plant Duds," *Wall Street Journal,* Aug. 15, 1985, p. 26, col. 3, at cols. 3-4.

In 1944, this Court was called upon to define the measure of constitutional protection the regulatory compact affords the investor, in light of the strong consumer interest against exploitative rates. In *Hope*, *supra*, the Court held that a utility has a constitutional right to receive just and reasonable rates. The Court defined such rates as those which enable the utility to meet its operating expenses and capital costs, and which assure market confidence in its financial integrity so as to allow it to maintain its credit, attract capital, and to pay dividends. Subject only to a limitation of ratepayer exploitation, the right to nonconfiscatory, just and reasonable rates is otherwise absolute.

Because the interests of ratepayers and investors sometimes diverge, this Court has developed a flexible, yet practical, approach for determining whether the "just and reasonable" criterion has been met in a particular case. In *Hope*, the Court abandoned the traditional "fair return on fair value" ratemaking formula for measuring whether investor interests had been adequately satisfied. *See Smyth* v. *Ames*, 169 U.S. 466 (1898). In its place, the Court devised a balancing formula wherein *utility financial integrity* represents one side of the equation. *Hope* held that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and

to compensate its investors for the risks assumed" were required to meet the constitutionally-mandated "just and reasonable" standard. *Hope, supra*, 320 U.S. at 605.[11]

The *Hope* decision specified the following indicia for measuring the investor interest to be weighed against the ratepayer interest:

> "[T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. *These include service on the debt and dividends on the stock.*" 320 U.S. at 603 (emphasis added).[12]

In applying the standard of confiscation enunciated in *Hope*, the Court mandated that in reviewing whether a rate is constitutionally acceptable, the regulator and the reviewing court must consider the "end result" of the rate-making process—the rate itself—and not the particular methodology used in reaching that rate. *Hope, supra*, 320 U.S. at 602 ("It is not the theory but the *impact* of the rate order which counts") (emphasis added); *FPC* v. *Memphis Light, Gas and Water Division, supra*, 411 U.S. at 474; *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 605 (1945). Moreover, there must be a considered

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11 *Cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) ("[T]he just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards"); *Jersey Central Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (*en banc*) ("[T]he *Hope* test defines the point at which a rate becomes constitutionally confiscatory"). *See FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

12 *See also FPC* v. *Memphis Light, Gas & Water Division*, 411 U.S. 458, 474, 465-66 (1973):

> "[U]nder *Hope Natural Gas* rates are 'just and reasonable' only if consumer interests are protected *and if the financial health of the [utility] in our economic system remains strong* [measured by] . . . revenues [sufficient both] . . . to maintain [the utility's] credit and to attract capital.' " (Emphasis added; citation omitted.)

judgment which balances all of the pertinent factors. A reviewing court, in assessing a rate order:

> "must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. *The court's responsibility is* not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead *to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*" *Permian Basin Area Rate Cases, supra*, 390 U.S. at 792 (emphasis added).

However, this balanced approach to regulation is today in disarray throughout the United States. Utilities teeter on the brink of financial collapse in New York, New England, Louisiana and Texas. Commissions seeking to achieve a constitutional balance, and to avoid confiscation of utility property, are routinely reversed on the basis that the financial burden of nuclear power, the national pride and goal of the early 1970's, must simply be borne by the investors, while the ratepayers wash their hands of the whole affair.[13] This is the situation with the four nuclear plants in question in the *Duquesne* case in which this Court has noted probable jurisdiction. Additionally, disallowances for "over-capacity," running to unimaginable proportions, are routine. *See, e.g., Kansas Gas & Electric Co.* v. *State Corp. Comm'n*, 239 Kan. 483, 720 P.2d 1063 (1986), *prob. juris. noted*, 107 S. Ct. 1281, *appeal dismissed*, 107 S. Ct. 2171 (1987);[14] *Kansas City Power & Light Co.* v. *State Corp.*

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13 On the other hand, no court and certainly not the New Hampshire Supreme Court has suggested that the other part of the regulatory compact, the part which imposes on the utility a duty to supply electricity, has in any way been abrogated.

14 *In Kansas Gas & Electric Co.*, the appeal was dismissed as moot with respect to the takings question; hence the utility's equal protection challenge based on that question was dismissed for want of a substantial federal question.

Comm'n, 239 Kan. 489, 720 P.2d 1063 (1986), *prob. juris. noted*, 107 S. Ct. 1281, *appeal dismissed*, 107 S. Ct. 3280 (1987) (case dismissed pursuant to agreement of the parties). And finally, one major utility, PSNH, was forced over the ultimate brink.[15]

The lower courts show no unified understanding of the applicable law. In a notable decision last year, an *en banc* panel of the United States Court of Appeals for the District of Columbia Circuit, in *Jersey Central Power & Light Co.* v. *FERC*, *supra*, concluded that when a ratemaking agency precludes any *Hope* balancing by summary application of its own regulatory standard and the financial integrity of a regulated utility is thus jeopardized, the owner of a cancelled nuclear plant is entitled to a full-scale *Hope* hearing as to whether a reasonable return on investment had been afforded to investors, "taking into account whether any higher return would amount to exploitation of consumers" (810 F.2d at 1181, n.3). Writing for the *Jersey Central* court, Judge Bork focused on *Hope's* requirement of

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15 It should be noted that PSNH's bankruptcy does not render this appeal moot. A utility's value is measured, in part, by what it can earn in rates, its "going concern" value. Whether or not Seabrook costs are recoverable in rates is a central element in the valuation of the debtor. Any meaningful reorganization plan depends upon resolution of that issue. In addition, the Bankruptcy Code provides that in order to confirm a plan of reorganization which changes utility rates, approval of the regulator is required:

"§ 1129 Confirmation of plan

"(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

"(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." 11 U.S.C. § 1129(a)(6) (1982 & Supp. IV 1985).

Accordingly, it is of vital importance, both to an effective reorganization and to the State of New Hampshire, to know whether or not Seabrook costs may be included in rate base despite the anti-CWIP law, in order to restore the financial condition of the utility that has been destroyed by its unconstitutional application.

"end result" rate relief, and the utility's right to have its financial integrity considered in defining a "just and reasonable" rate:

> "In reviewing a rate order courts must determine whether or not the *end result* of that order constitutes a reasonable balancing, *based on factual findings*, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." 810 F.2d at 1177-78 (citing *Hope*; emphasis added).

The New Hampshire Supreme Court found *Jersey Central* "not as helpful to . . . [PSNH's] position as might appear on a first reading." App. A at 13a. It then distinguished *Jersey Central* on the basis that there, no "legislatively established policy," *i.e.*, the anti-CWIP law, existed. App. A at 14a. While highlighting a distinction without a difference—summary application of legislative as distinct from administrative policy—the New Hampshire Supreme Court did not see fit to address the critical point made by *Jersey Central*: that the Constitution requires factual balancing of the specific issues raised in a specific case, including the financial integrity of the utility. This balancing must be accomplished free of any arbitrary methodological restraints.[16]

Instead, the New Hampshire Supreme Court quoted the specious reasoning of the Pennsylvania Supreme Court, which stated:

> "In cases where the balancing of consumer interests against the interests of investors causes rates . . . which [are] insufficient to ensure the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business en-

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16 The court also attempted to distinguish *Jersey Central* on the basis that in *Jersey Central* the utility was impermissibly denied a hearing. The instant situation is, however, exactly analogous because PSNH likewise has not been permitted to demonstrate on the merits why a rate that includes CWIP would not be exploitative of consumers.

> terprise, namely the risk of financial failure." *Pennsylvania Electric Co.* v. *Pennsylvania Public Utility Comm'n*, 509 Pa. 324, 331, 502 A.2d 130, 134 (1985).

This line of reasoning distorts both the language and the meaning of *Hope*, which notes that "a just and reasonable rate is one which reflects, among other things, a rate of return 'commensurate with returns on investment in other enterprises having corresponding risks.' " App. A at 10a, quoting *FPC* v. *Hope*, *supra*, 320 U.S. at 603.

In adopting this flawed reasoning the New Hampshire Supreme Court failed to note: 1) that very few other enterprises are compelled, by statute, to provide their product to all comers, on demand, at regulated prices not set by the marketplace; 2) that constructing electric generating capacity, whether nuclear or otherwise, involves hundreds of millions of dollars and takes years to accomplish; and 3) that no investors, with foreknowledge of what some state courts now say is the extent of their rights, would ever risk capital in an anti-CWIP state. This eroding approach to investor protection has been succinctly stated by the Supreme Court of Ohio: "[T]he [federal] Constitution no longer provides any special protection for the utility investor." *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 4 Ohio St. 3d 91, 99, 447 N.E.2d 733, 740 (1983). Indeed, the Supreme Court of New Hampshire echoed these sentiments: "In the broad sweep of utility regulation and financing, fundamental changes of risk allocation are policy matters for the legislature *rather than constitutional matters for the courts*" (emphasis added). App. A at 22a.

This appeal presents many of the same questions raised in *Duquesne*, *supra*. But here, the consequence of the failure to balance the utility's loss of financial integrity is presented in its gravest form. Moreover, this appeal presents the case of a multi-billion dollar construction investment held in limbo, neither cancelled nor in service, yet just as much requiring appropriate balancing to set just and reasonable rates under the circumstances as any other utility investment governed by *Hope's* end result test of constitutionality. It is time for this

Court to reaffirm that *Hope* balancing is constitutionally required, is properly subject to judicial review, and cannot be satisfied by legislative fiat.[17]

II. The New Hampshire Court's Dictum that PSNH Investors Had Been Compensated for Risk by An "Enhanced Rate of Return" Is Factually and Conceptually Baseless

As noted, the New Hampshire court's decision turns on its conclusion that *Hope's* constitutional mandate for a process which balances interests is satisfied by a legislative enactment, rather than by requiring an adjudicatory process of balancing on a case-specific basis. The constitutional soundness of that conclusion is the issue raised in this appeal. However, the New Hampshire decision attempts to justify that outcome in PSNH's case (and perhaps to befog the constitutional issue as well) by suggesting that despite the anti-CWIP law's specific prohibition to the contrary, PSNH investors have somehow been adequately compensated through an "enhanced rate of return" allowed in the New Hampshire rate-making process.[18] This is pure dictum, based on an incorrect reading of a PUC decision, a total absence of factual predicate, and a faulty conceptual premise.

The court asserted that PSNH had actually received such a rate of return. As the court stated:

> "Indeed, the PUC granted such an enhanced rate of return in *Re Public Service Co. of N.H.*, 65 N.H.P.U.C. 45, 48-51 (1980) . . . ." App. A at 11a.

But this seems to be a plain miscitation.[19] In the cited case, the PUC had been challenged by intervenor Legislative Utility Con-

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17 Should this Court decide to note probable jurisdiction of this appeal, PSNH respectfully submits that it would be both appropriate and of aid to the Court to schedule argument in tandem with *Duquesne Light Co.* v. *Barasch* (No. 87-1160).

18 Presumably, an "enhanced rate of return" is an additional percentage added to the rate of return for the purpose of compensating for increased risk to investors.

19 A copy of the decision is at App. J.

sumers' Council ("LUCC") for illegally including an enhanced rate of return which LUCC argued would be barred by the anti-CWIP law. The PUC wrote:

> "The commission has *not* allowed an enhanced rate of return. Seemingly, this concept is based on some misconception that the commission has found a level of return and just added some enhancing factor. *This argument is simply false.* The commission by law is bound to provide a utility the opportunity to earn not less than *a reasonable return* on the cost of property of the utility *used and useful* in the public service less accrued depreciation." 65 N.H.P.U.C. at 49 (citation omitted, emphasis added).

Indeed, the PUC has never allowed a rate of return to equity holders to be enhanced to reflect the additional risk of total loss of investment nor, of course, has it allowed *any* return on construction investment, "enhanced" or otherwise.[20]

The PUC's position in that regard was based on the conclusion that a rate of return that simply recovered CWIP in a different form would violate the anti-CWIP law. Subsequently, the New Hampshire court affirmed that conclusion in relation to recovery of the cost of cancelled plant. As the court wrote:

> "It is clear that the commission could not simply increase the rate of return for the purpose of producing the same revenue over the same period of time that might be produced if the investment were amortized as an expense. This would merely be a recovery of investment by less direct means than expense or rate base treatment." *Appeal of*

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20 The pending appeal of rates noted by the New Hampshire Supreme Court (App. A at 11a-12a) involves, *inter alia*, a *refusal* by the PUC to include *any* such enhancement of rate of return. Even were such an enhanced rate of return to be granted, this would be insufficient in view of the financial crisis of 1987 to maintain the financial integrity of the utility, hamstrung as it is, not by market risk but by its statutory obligation to invest in future sources of electricity at what the court held to be no risk whatsoever to the consumer, irrespective of the circumstances.

Public Service Co., 125 N.H. 46, 55, 480 A.2d 20, 25-26 (1984).[21]

The court's effort in the present case at a makeweight to justify the absolute prohibitions of the anti-CWIP law led it to draw its conclusions about "enhanced rate of return" in the total absence of a factual record. Having asked for no specific factual findings from the PUC on this point, the court, with no support whatsoever, simply assumed that PSNH investors had been compensated for the increased risk imposed by the law. To what extent they have been compensated, how such compensation was computed, whether the return was adequate, how the investor measured his benefit, and how much of his investment was covered by such protection apparently were matters of no concern to the court.[22]

In addition to the lack of any grounding in the referenced PUC decision or in the record, the New Hampshire court's theory that an "enhanced rate of return" provided PSNH's investors with constitutionally adequate compensation is conceptually unsound, especially in light of the New Hampshire anti-CWIP law and the New Hampshire court's own previous interpretation of that law. As previously interpreted and applied by the New Hampshire court, the anti-CWIP law must be taken literally, as a complete and total bar to any compensation of or on construction investment unless and until the construc-

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21 This decision, which involved the denial of recovery of PSNH's investment in the cancelled Pilgrim II nuclear plant, established that, as a matter of statutory interpretation, the anti-CWIP law barred any recovery for cancelled plant, exactly the situation in *Duquesne*, *supra*. In the Pilgrim case, the New Hampshire Supreme Court refused to rule on the constitutionality of the statute, because of what it said was an incomplete factual record (Case No. 84-140, Order of April 3, 1984), then refused to clarify what additional facts were needed for determination (*id.*, Order of July 5, 1984, denying PSNH motion for clarification of remand).

22 The court's willingness to assume that investors had been compensated in the absence of a factual record in this case contrasts starkly with its refusal to adjudicate the constitutional issues in the absence of such a record in the Pilgrim II case, *supra*.

tion is complete and in service. *Appeal of Public Service Co.*, *supra*. No rate-making device for that purpose, whether expanded rate base, increased rate of return or additional expense provision, is permitted under the statute. *Id.*

Thus, at no time since the anti-CWIP law went into effect in 1979 have PSNH investors been compensated through rates for any part of their investment in Seabrook Station or any of the risk attendant thereto, for the simple reason that this investment could not lawfully be the subject of rate relief. It is important to recognize that this investment alone is nearly three times as large as PSNH's total investment in plant in service, the only allowable base on which rates can be made under New Hampshire law. Accordingly, if PSNH investors were ever accorded an "enhanced rate of return" to recognize construction risk, that rate could have been applied as a matter of New Hampshire law only to the far smaller investment in plant in service, rather than to the construction investment actually at risk.

The arithmetic is inescapable: unless the increment in rate of return were so great as to produce an equivalent dollar return on the far smaller base, PSNH investors simply could not have been compensated for the construction investment, and the New Hampshire court's own decision in Pilgrim II prohibited such an increment in rate of return.[23] Even so, a substantial increment in rate of return, if applied only to investment in plant in service, might do something to compensate PSNH investors for increased risk in investing in PSNH operating plant, but would do nothing to compensate them for investing in unfinished construction. To the extent the New Hampshire decision suggests otherwise, it is conceptually untenable.

The New Hampshire court's suggestion that a minor rate of return increment could adequately compensate for the risk im-

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23 Indeed, it was demonstrated below that a rate of return on existing rate base of 52.08% would have been required in order simply to support debt already incurred, together with operating expenses and construction, and to provide no new borrowing or dividends to equity investors. App. A at 6a. The New Hampshire Supreme Court does not suggest that an enhancement in rate of return of over 300% could be permissible—indeed, it would run afoul of the anti-CWIP law.

posed by the anti-CWIP law also ignores the financial environment created by the law. Concern over the law's ultimate impact caused PSNH debentureholders in the Spring of 1987 to demand yields to maturity in excess of 35%, as established in the record below. In such an environment, PSNH simply could not access financial markets to any meaningful extent. In this context, an "enhanced rate of return" on plant in service is a meaningless concept. The court's resort to "enhanced rate of return" as an offset to the anti-CWIP law also ignored its own prior precedent, ignored the statutory requirement to provide electricity that compels the construction in the first place, and ignored the utility's traditional right to receive at least repayment of prudently incurred cost. *See Mississippi River Fuel Corp.* v. *FPC*, 163 F.2d 433 (D.C. Cir. 1947).

Most significantly, the Supreme Court of New Hampshire has forgotten the constitutional touchstone of *Hope*, that it is the *resulting rate* which must be *just* and *reasonable*, not simply the particular process by which it is reached. *Hope* mandates no particular methodology, and forbids no particular process. *Hope*, *supra*, 320 U.S. at 602-03; *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at 776-77. But it indubitably requires a balancing within a zone of reasonableness. *See*, *e.g.*, *Washington Gas Light Co.* v. *Baker*, 188 F.2d 11, 14-15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951).

Despite PSNH's argument that it was entitled to rate relief to maintain its financial integrity, unless that rate became exploitative of consumers, as held by the *Jersey Central* court, the New Hampshire Supreme Court chose to ignore the argument entirely. By so doing, it ruled, in effect, that the New Hampshire legislature could constitutionally determine, in advance, that any payment for current construction, prior to its placement in service, is *per se* exploitative.

For over eight years, PSNH tried to "go it alone," without ratepayer support—to abide by the will of the legislature in mandating that its ratepayers pay later, rather than currently, for the generating capacity necessary to meet the obligations that are imposed on the utility by law. When that effort failed,

through no fault of PSNH, the Supreme Court of New Hampshire disparaged PSNH's attempt to obtain partial ratepayer sharing of costs as an attempted "bailout." But what in fact that court has done in the name of risk allocation is simply to say that the New Hampshire legislature can permissibly decree that there be no rate support of investment except for plant in service, *i.e.*, plant "used and useful." This elevates the "used and useful" doctrine above the *Hope* balancing test, just as the Supreme Court of Pennsylvania has expressly done in *Duquesne* v. *Barasch*.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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March 30, 1988

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APPENDIX A

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 4:00 P.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission
No. 87-311

PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
(New Hampshire Public Utilities Commission)

January 26, 1988

Sulloway, Hollis & Soden, of Concord (*Martin L. Gross* and *R. Carl Anderson* on the brief, and *Mr. Gross* orally), for Public Service Company of New Hampshire.

Stephen E. Merrill, attorney general (*Mr. Merrill* and *Larry M. Smukler*, assistant attorney general, on the brief, and *Mr. Smukler* orally), for the State.

Michael W. Holmes and *Joseph W. Rogers*, of Concord (*Mr. Holmes* and *Mr. Rogers* on the brief, and *Mr. Holmes* orally), for the Office of the Consumer Advocate.

Hinkley & Hahn, of Manchester (*Robert C. Hinkley & a.* on the brief, and *Mr. Hinkley* orally), for the Campaign for Ratepayers' Rights.

Michael B. King, of Portsmouth, by brief for Mary P. Chambers, House Democratic Leader, as amicus curiae.

BATCHELDER, J. This interlocutory transfer, filed by the New Hampshire Public Utilities Commission (PUC or commission) pursuant to RSA 365:20, raises the issue of the constitutionality of applying RSA 378:30-a to the fixing of electric utility rates in an emergency rate proceeding. The commission reserved, certified, and transferred three questions of law which are set forth in the discussion below. We answer all three questions in the negative, and hold that RSA 378:30-a is constitutional under the State and Federal Constitutions on the facts presented to us in this transfer.

I. *Facts and Procedural History*

This interlocutory transfer is viewed, and its issues decided, against a factual background which must be unique in the annals of public utility financing. Public Service Company of New Hampshire (PSNH or company) is the owner of an approximately 35% interest in the Seabrook Unit I nuclear generating station, which for practical purposes had its construction phase completed on or about October 31, 1986, at a cost to PSNH of $1,770,617,913. The total project cost, we were told at argument, has, since the completion date, been increasing at the rate of $50 million per month. Because its final licensing proceeding is yet to be complete, the plant is producing neither electricity nor income, and the likelihood and timing of either event are matters of speculation and uncertainty.

To ameliorate the costly effects of these circumstances, PSNH, on August 5, 1987, petitioned the commission to "Alter Existing Rates on Account of Emergency Circumstances," docketed as DR 87-151 (application). PSNH requested an emergency rate surcharge which would produce approximately $70.98 million in additional annual revenues, an increase of 15% based on sales for the twelve months ended December 31, 1986. In its application, PSNH proposed that the commission allow the company a special emergency rate base increment of $464.5 million, representing approximately 27% of PSNH's to-

tal investment of $1.77 billion in Unit I. PSNH proposed also that the commission allow a special emergency rate of return of 15.28%, the company's cost of debt capital as determined by the commission in PSNH's most recent rate case, DR 86-122. *See* Report and Order No. 18,726 (June 1987). In order to expedite consideration and determination of this application, PSNH submitted, on the same date, a request that the commission reserve, certify, and transfer the following question to this court in accordance with RSA 365:20:

> "Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) Its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) Its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
>
> (3) Accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity.
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called 'anti-CWIP' statute?"

The commission anticipated that answers to the question set forth in the requested transfer were likely to control the outcome of PSNH's request for emergency relief in DR 87-151 and granted PSNH's request without holding a hearing. Furthermore, without making specific findings of fact, the PUC provided this court with basic facts that the commission accepted for purposes of this transfer. The commission also added a second question which addressed the constitutionality of applying RSA 378:30-a:

> "Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress [(CWIP)] on a con-

> struction project in rate base before said construction project is actually providing service to cust mers, notwithstanding the requirements of RSA 378:30-a?"

Following the filing of the interlocutory transfer, a prehearing evaluation conference was held before Howard J. Zibel, Esquire, Deputy Clerk of this court, for the Supreme Court on August 25, 1987, the primary focus of which was consideration of the adequacy of the factual record. As a result of that conference, we deferred acceptance of the transfer in an order dated September 2, 1987, until the commission conducted hearings and made findings of fact sufficient for "informed consideration of [the] constitutional issues." *Appeal of Public Serv. Co. of N.H.*, 125 N.H. 46, 48, 480 A.2d 20, 21 (1984). Specifically, this court requested the commission to make findings of fact on the following issues:

> "a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.
>
> b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter."

The commission held hearings on the proposed issues on September 16, 17, and 21, and on October 16, 1987, submitted to this court a record reflecting findings of fact on both issues. *See* Report and Sixth Supplemental Order No. 18,873. A supplemental report and record was transferred to this court on November 2. Report and Ninth Supplemental Order No. 18,890.

Under issue a., the PUC found with respect to the "claimed need" of PSNH that it was unlikely that PSNH would be in a position to meet its cash obligations as they became due: namely, interest and principal payments on debts, expansion of

service to customers, and fuel expenses, payroll, and other related expenses. The commission examined two traditional sources of funds for PSNH: external financing and rates. The PUC found that financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of high risk. The commission noted, however, that there is the possibility that existing debt could be restructured, but it is improbable that this would occur before January, 1988. External financing, therefore, is not a dependable alternative for restoring PSNH's financial integrity.

The other source of funds for PSNH is rates. Before considering the variables involved in an actual rate increase, the commission examined two rate-related alternatives. The commission found that PSNH could delay a refund owed to ratepayers ordered by the PUC in a previous docket. This would provide approximately $21 million, and would permit PSNH to meet its cash obligations into 1988. However, PSNH did not request authorization to delay the refunds, and the commission did not intend to authorize such a delay *sua sponte*.

The second alternative dealt with the possibility of PSNH's successfully appealing the prior rate order in DR 86-122. However, the PUC determined that even if PSNH were successful, the maximum amount PSNH could add to its revenues would not meet its claimed revenue needs.

The most realistic alternative, according to the commission, is additional cash through a rate increase. In order to justify this, one or more of three variables in the formula expressing the traditional ratemaking methodology might be adjusted to allow higher revenue to be raised by rates charged to consumers. *See Appeal of Conservation Law Foundation*, 127 N.H. 606, 640, 507 A.2d 652, 675 (1986); *Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 49, 480 A.2d at 22. The first is the value of the rate base, which could be increased by including a portion of PSNH's investment in Seabrook. The commission found this approach specifically precluded by RSA 378:30-a. *See Appeal of Public Serv. Co. of N.H.*, *supra* at 54-55, 480 A.2d at 25.

The second variable is the expense component of the ratemaking formula, which could be adjusted upward to cover the cost of servicing debt or equity capitalization not reflected in the rate base. However, the commission concluded that this would result in covering capitalization related to PSNH's investment in Seabrook. Again, the commission believed that this was prohibited by § 30-a.

The third variable subject to adjustment is the rate of return on rate base. According to the testimony, the commission found that modifying this variable to meet actual revenue need would require a return on equity of 52.08% (34% after tax adjustments) to achieve the requested revenue level. But such rates would far exceed traditional rates of return, and the commission was concerned that authorizing them would merely circumvent the restrictions of § 30-a. *See Appeal of Public Serv. Co. of N.H.*, *supra* at 55, 480 A.2d at 26 (commission may not adjust rate of return to permit recovery of lost investment, as distinguished from reflecting risk of such loss in setting rates).

The PUC found, in conclusion, that PSNH needs additional revenues from a rate increase in order to meet its cash obligations. However, a sufficient adjustment of any one of the variables comprised by the traditional ratemaking formula would, in the opinion of the commission, violate § 30-a.

Under issue b., concerning the historical levels of investment by PSNH in Seabrook at various times related to the effective date of § 30-a, the commission constructed a table reflecting such levels of investment, which was supplemented later by a revised table. Although PSNH's ownership percentage in Seabrook Unit I has decreased from 50% to 35.56942% since the enactment of RSA 378:30-a, the commission noted that PSNH's cash investment did not decline and did not, therefore, adjust the investment to reflect the change. The commission included as PSNH's cash investment the cost of procuring and constructing Seabrook Unit I, indirect costs, common plant, nuclear fuel, and land. The common plant component of the investment consists of the facilities designed to serve both Unit I and Unit II. The first table displayed the total investment in Unit I without deducting any portion of the common plant,

since the PUC at that time lacked the appropriate figures. The second table, provided in the supplemental report and record, showed PSNH's investment in Unit I, including only 50% of the common plant. While the PUC found it most reasonable for purposes of this case to split the common plant evenly between the two units, it noted that it made no finding regarding the proper method of allocating plant for purposes of rate base once one plant of a two-plant project is cancelled and the other is operating. The following table, which embodies the final results provided in the supplemental report and record, sets forth the commission's findings on PSNH's investment in Unit I:

Date	*PSNH Investment in Unit I*
04/30/77	65,003,098
05/31/78	152,376,338
04/30/79	214,210,548
12/31/79	287,920,316
12/31/80	408,505,079
12/31/81	445,555,835
12/31/82	607,373,109
12/31/83	854,348,392
12/31/84	1,084,696,629
12/31/85	1,347,895,265
12/31/86	1,624,262,219
12/31/87	1,766,468,881

Commissioner Bisson concurred in the commission's report, but submitted separate tables on the investment levels which excluded PSNH's investment in the plant's education center and the termination yard, which is the main switching yard for the station, because those items have been included in the company's rate base for several years.

On November 4, 1987, after the filing of the commission's supplemental report, we accepted the interlocutory transfer and ordered briefing. On November 5, 1987, the PUC filed a request to address the following third question, which we accepted:

> "Does the proper interpretation of RSA 378:9, which provides that the commission may 'temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . .' when it finds that an emergency exists, allow the commission, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?"

Oral arguments were held on December 15, 1987, during which the parties addressed the transferred questions, summarized as follows: (1) the right of PSNH to obtain a hearing before the PUC to establish a level of rates necessary to restore PSNH's financial integrity, notwithstanding the "anti-CWIP" statute, RSA 378:30-a; (2) the constitutionality of RSA 378:30-a under the circumstances of this case; and (3) the authority of the PUC to set emergency rates pursuant to RSA 378:9 under the circumstances of this case, notwithstanding RSA 378:30-a.

II. *Constitutionality of the Statute*

It should be noted at the outset that PSNH does not make a facial attack on the anti-CWIP statute and claim its unconstitutionality *per se*, but bases its claim on the particular facts giving rise to the transferred questions in this case. In other words, PSNH claims unconstitutionality as the statute is applied to it in the company's present circumstances. Hence, the focus of our inquiry can be considerably narrowed by recognizing the obvious relationship between transferred questions 1 and 2. Although initially PSNH sought only the right to a hearing before the PUC, the commission concluded that the company would not be entitled to the revenue increase in the amount requested unless RSA 378:30-a was held invalid. (The commission, of course, did not make any finding at this stage of the proceeding as to whether the standard of "just and reasonable" would permit any increase in rates at this time.) Indeed, PSNH recognized this in framing question 1, as it sought a hearing and rate in-

crease "notwithstanding RSA 378:30-a." It is clear then that question 1 is subsumed by question 2, and both stand or fall together.

The text of the statute under examination provides:

> "378:30-a *Public Utility Rate Base; Exclusions.* Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

RSA 378:30-a. Both the concept of CWIP and the interpretation of the broad prohibitory language of this section have been fully examined by this court in *Appeal of Public Serv. Co. of N.H. supra*, and need not be repeated here. Suffice it to say that the anti-CWIP law simply forbids return on or recovery of investments through utility rates before the project is completed and providing service to customers. *Appeal of Public Serv. Co. of N.H., supra* at 54-55, 480 A.2d at 25. One response to this mandate is known as an allowance for funds used during construction (AFUDC), which reflects the cost of delay in earning a return when an investment ultimately is placed in the rate base. *See Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22.

We do not, however, rely on AFUDC in assessing the constitutionality of RSA 378:30-a under the fifth and fourteenth amendments to the United States Constitution and part I, article 12 of the New Hampshire Constitution. We look instead to the constitutional limitations on rate regulation set forth by the United States Supreme Court in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *Hope* represents the culmination of decades of judicial inquiry into the proper

constitutional restraints on the process of public utility rate regulation and the focus of substantive judicial review of ratemaking. *See generally* Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. 65 (1985). The opinion in *Hope* establishes a limited and simplified constitutional yardstick. Briefly, the constitution requires only that the regulatory body engage in a rational process of balancing consumer and investor interests to produce a rate that is just and reasonable. 320 U.S. at 602, 603. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968) (commission to give reasoned consideration to investor interests as well as provide protection to the relevant public interests); *Market Street R. Co. v. Comm'n*, 324 U.S. 548, 563 (1945) (investor interests considered in light of diminished service to the public); *Appeal of Conservation Law Foundation*, 127 N.H. at 636, 507 A.2d at 672 (object of process is to strike a fair balance between customer and investor interests); *Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d 130, 133 (Pa. 1985) (*Hope* requires only that regulatory agency balance competing consumer and investor interests to determine just and reasonable rates). A just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation. *See, e.g., Appeal of Conservation Law Foundation*, *supra* at 635, 507 A.2d at 672; *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 342, 402 A.2d 626, 632 (1979); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951). With regard to investment interests, a just and reasonable rate is one which reflects, among other things, a rate of return "commensurate with returns on investments in other enterprises having corresponding risks." *Power Comm'n v. Hope Gas Co.*, *supra* at 603; *Company v. State*, 95 N.H. 353, 361, 64 A.2d 9, 16 (1949).

Hope, however, is apposite to the question before us, not for what it holds that the constitution promises, but rather for what it explains that the constitution declines to guarantee. The import of *Hope* is that the constitution is only concerned with the

end result of a rate order; *i.e.*, that it be just and reasonable. Under *Hope*, the particular ratemaking methodology employed by the regulatory agency is, for the most part, constitutionally irrelevant. *See Power Comm'n v. Hope Gas Co.*, 320 U.S. at 602 (commission not bound to any single ratemaking formula). The only limitation on the methodology is that it produce neither confiscatory nor exploitative rates.

The anti-CWIP statute affects ratemaking methodology by assigning the cost of carrying investment in CWIP, and by allocating the risk of direct loss that may result if the construction never becomes productive, to investors rather than consumers. *See Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22. As noted above, it forbids the commission from setting utility rates to be paid by consumers on the basis of investment in construction prior to commencement of a project's operation. *Id.* at 54-55, 480 A.2d at 25. Thus, the construction risks of such projects are not to be passed on to ratepayers. Instead, these risks are, by legislative mandate, to be borne by investors. The constitutional consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them.

The PUC has already addressed the effect of this risk allocation. In *Re Public Serv. Co. of N.H.*, 64 N.H.P.U.C. 295, 304 (1979), the PUC acknowledged that in making rates, its discretion is expressly limited by the language of the anti-CWIP statute. Additionally, the commission correctly maintained that it has a "duty to balance the interests of the investor and the consumer through the establishment of just and reasonable rates, the 'touchstone' for utility regulation." *Id.* The commission concluded that exclusion of CWIP from PSNH's rate base had the effect of substantially increasing investor risk. *Id.* at 306. The PUC determined that the overall rate of return on PSNH's rate base, even though that rate base no longer includes CWIP, may have to be enhanced to reflect the additional risk to investors created by anti-CWIP. *Id.* Indeed, the PUC granted such an enhanced rate of return in *Re Public Serv. Co. of N.H.*, 65 N.H.P.U.C. 45, 48-51 (1980), and since that time the company

has filed one appeal challenging the rates or rate of return allowed by the commission, an appeal which is currently awaiting argument before this court.

The company concedes that the anti-CWIP law can be constitutionally applied in some circumstances. Furthermore, the company does not claim that no rate could ever be commensurate with the risk imposed by § 30-a. Moreover, as revealed by the PUC's treatment of § 30-a in its 1979 and 1980 orders discussed above, there is no basis for claiming that the timing of the enactment of § 30-a precludes constitutional application. Throughout the life of the Seabrook project, with the exception of the limited period between PUC order No. 13,162 (May 25, 1978) which included CWIP in the company's rate base, *see LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 402 A.2d 626 (upholding order as a matter of policy), and the effective date of § 30-a (May 7, 1979), CWIP has been excluded from the rate base. This is not a situation, for example, in which the anti-CWIP law was enacted on the eve of the loss itself, so that enforcing it would preclude both a return commensurate with risk and a recoupment of the loss.

The essence of the company's position in this interlocutory transfer is not, therefore, the company's desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. PSNH seeks, rather, nothing less than allocation of the risk back to the ratepayers now that the risk of inoperative investment has materialized. Section 30-a injected into the investment assessment the risk of delay of return, not only during construction, but also when construction is completed, possibly forever. That is, failure to recover the cost of a completed but non-functioning plant is one of the risks that a higher rate of return compensates the investors for bearing. That risk has materialized; and now, by asking that CWIP be included in rate base, the company is asking to shift the risk back to the ratepayer. The company and its investors have received compensation for the risks they have assumed through an enhanced rate of return, and here seek relief from those risks now that they have come to pass. Essentially, the company seeks a bailout. With or without anti-CWIP, the State and Fed-

eral Constitutions do not allow the company to have it both ways. In the words of the Pennsylvania Supreme Court:

> "In cases where the balancing of consumer interests against the interests of investors causes rates . . . which [are] insufficient to ensure the continued financial integrity of the utility, it may simply be said that the utility has encountered one of the risks that imperil any business enterprise, namely the risk of financial failure."

Pennsylvania Elec. v. Pennsylvania Pub. Util., 502 A.2d at 134.

Although *Hope* does guarantee a return proportionate to the risk, PSNH is wrong in contending that *Hope* and its progeny guarantee to a utility a rate which assures its financial integrity. Based on the clear indications that the Hope Natural Gas Company was financially sound and well-managed, the *Hope* court enumerated as a consideration for the regulatory agency the impact that a particular rate would have on the financial integrity of the company. *Power Comm'n v. Hope Gas Co.*, 320 U.S. at 603. But *Hope* made no promises with respect to guaranteeing net revenues, *id.*, and later cases reiterated *Hope*'s statement that regulation does not insure profits. *See, e.g., Market Street R. Co. v. Comm'n*, 324 U.S. at 566. The Supreme Court has expressly held that it is not the mandate of the constitution to rejuvenate the value of the investments of a company whose "zenith of opportunity" has been eclipsed by the operation of economic forces. *Id.* at 554; *cf. Appeal of Conservation Law Foundation*, 127 N.H. at 636, 507 A.2d at 672. Providing a return sufficient to maintain the financial integrity of a sound company is one thing; restoring the financial integrity is another.

At this juncture, we point out that a case much relied upon in the brief of PSNH, *Jersey Central Power & Light Co. v. Federal Energy Regulatory Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987) (*Jersey Central*), is not as helpful to the company's position as might appear on a first reading. In *Jersey Central*, the utility sought relief from a Federal Energy Regulatory Commission (FERC) order modifying the utility's proposed rate schedule. The utility charged "that it alleged facts which, if proven,

show that the reduced rates are confiscatory and violate its statutory and constitutional rights as defined by the Supreme Court in [*Hope*]." 810 F.2d at 1169. Several factors distinguish *Jersey Central* from this interlocutory transfer. First, the utility in *Jersey Central* was denied a hearing, resulting in its rate schedule being reduced summarily. Second, although the utility claimed entitlement to relief under *Hope* because of its financial precariousness resulting from its lost $397 million investment in a cancelled nuclear generating station at Forked River, New Jersey, there was no legislatively established policy, to be considered in any *Hope* analysis, relating to exclusion from rate base of CWIP. Finally, in *Jersey Central*, FERC denied a hearing to the utility despite the utility's claim that the commission would neither include the lost construction investment in the rate base, nor allow the utility a rate of return consistent with placing the risk of loss entirely on the utility and its investors. *Id.* at 1171. Thus, where FERC was alleged to have denied both rate base treatment and an adequate return, PSNH here demands to be given both.

Jersey Central's teachings are simple. First, the utility was impermissibly denied a hearing to make its case and to distinguish its situation from other instances in which FERC had excluded unamortized investments in cancelled plants from rate base, upon which FERC based its precedential foundation for summarily disposing of Jersey Central's request. *See* 810 F.2d at 1172. The second teaching of *Jersey Central* is that "the end result of commission rate orders must be 'just and reasonable' to both consumers and investors, and that, in achieving this balance, the commission must consider the impact of its rate orders on the financial integrity of the utility." *Id. Jersey Central* does not stand for the proposition, nor does PSNH argue, that a publicly regulated utility has a constitutional right not to go bankrupt. The case does not deal in any way with the public policy of anti-CWIP legislation. *Jersey Central* is not dispositive of this case.

At a time when Jersey Central Power & Light, and other utility companies in states where no anti-CWIP statutes were in force, determined that market forces required them to abandon

future construction of nuclear generating plants already under construction, PSNH in the face of an unchallenged anti-CWIP statute determined to proceed with construction. The risk of doing so was measured and calculated closely by the marketplace and investors, and was reflected in the interest rates charged on the company's bonds and notes and the market prices of its equity shares. The risk of failure was present in this enterprise as with any other business venture and was available for assessment by those who lent money and those who bought shares.

In enacting the anti-CWIP law, the legislature recognized that the rule may cause utilities to experience cash flow or other financial difficulties. *See* N.H.S. Jour. 604-15 (1979). It was fully cognizant that the CWIP prohibition would have the effect of allocating the direct consequences of the risk of nonoperation to investors, rather than ratepayers. Report of the Science and Technology Committee, N.H.H.R. Jour. 626-27 (1977). The legislature was aware that this risk allocation is ultimately more expensive for consumers if the project succeeds. *See generally Appeal of Public Serv. Co. of N.H.*, 125 N.H. at 50, 480 A.2d at 22 (describing allowance for funds used during construction (AFUDC) method of cost recovery). The anti-CWIP law, however, protects consumers against the direct consequences of a failed investment and places the onus on the financial markets to assess carefully investment decisions. Report of the Science and Technology Committee *supra*.

In making this determination, the legislature effectuated a return to the traditional interpretation of the used and useful principle. *See LUCC v. Public Serv. Co. of N.H.*, 119 N.H. at 343-44, 402 A.2d at 634 (permitting commission discretion in applying used and useful so as to include CWIP in rate base). This principle has been a long-standing tenet of New Hampshire public utilities law in determining whether a utility's property is included in or excluded from its rate base for ratemaking purposes. *Appeal of Conservation Law Foundation*, 127 N.H. at 637, 507 A.2d at 673. Indeed, the principle enjoyed constitutional status until the *Hope* decision. *Compare Smyth v. Ames*, 169 U.S. 466 (1898) *with Power Comm'n v. Hope Gas Co.*, 320

U.S. 591. Although the used and useful standard is no longer constitutionally mandated after *Hope*, it remains a constitutionally permissible legislative articulation of the perceived interests of consumers in paying directly only for the costs of a project actually in use and providing service to the public. *See* Drobak, 65 B.U.L. Rev. at 96 (advocating judicial deference to legislative judgment as to meaning of public interest).

We answer questions 1 and 2 in the negative.

III. *Retrospective Laws*

PSNH argues in the alternative that, if RSA 378:30-a is constitutional under the circumstances of this rate proceeding, then the statute, nonetheless, cannot operate restrospectively to bar recovery of or on the investment made prior to its enactment date, May 7, 1979. The company's claim is based on the New Hampshire Constitution, part I, article 23, which prohibits retrospective laws:

> "[Retrospective Laws Prohibited.] Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made either for the decision of civil causes, or the punishment of crimes."

The underlying purpose of this article is "to prevent the legislature from interfering with the expectations of persons as to the legal significance of their actions taken prior to the enactment of a law." *State v. Vashaw*, 113 N.H. 636, 638, 312 A.2d 692, 693 (1973).

A retrospective law has been defined in this manner:

> "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." 16(A) Am. Jur. 2d *Constitutional Law* § 661 (1979).

Vested rights have been described as follows:

> "[R]ights which have so completely and definitely accrued to or settled in a person that they are not subject to be de-

> feated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare." BLACK'S LAW DICTIONARY 1402 (5th ed. 1979).

Any vested right which the company had when it commenced construction was a right to the constitutional guarantees of *Hope*; namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary.

While the company accurately presents the legal rules with respect to retrospective laws, it fails to explain how these rules apply to its present condition. A review of the records pertaining to the enactment and the application of RSA 378:30-a reveals that it was applied only prospectively as of May 7, 1979.

In *Re Public Serv. Co. of N.H.*, 64 N.H.P.U.C. 295, the PUC reevaluated PSNH's rates after the enactment of RSA 378:30-a. There the commission stated "since the commission is not applying RSA 378:30-a as to any rate charge rendered to consumers prior to May 7, 1979, the commission is not altering any [legal provisions for the treatment or consequences of] events prior to May 7, 1979. The commission is thus applying RSA 378:30-a to events or rates after May 7, 1979, and thereby prospectively." *Id.* at 302. In other words, PSNH was allowed to keep revenue earned from a rate base which included

the value of CWIP. The commission originally included $111,258,428 as the value of CWIP in the rate base on May 25, 1978. *See Re Public Serv. Co. of N.H.*, 63 N.H.P.U.C. 127, 149 (1978). That value represented the accumulated costs at April 30, 1977 of four major projects: Seabrook I and II, Wyman IV, Millstone III and Pilgrim II. 63 N.H.P.U.C. at 138. The legislature prohibited the inclusion of CWIP by passing RSA 378:30-a a year later, in May 1979. Although the commission ordered PSNH to refund to the customers CWIP charges in *Re Public Serv. Co. of N.H.*, 65 N.H.P.U.C. 162 (1980), it limited the order to CWIP charges included in the rate from May 7, 1979, to December 28, 1979 (May 7 is the effective date of RSA 378:30-a and December 28 is the date of the emergency rate order which reflected exclusion of CWIP from the rate base). The commission noted that "[a]ny rates collected prior to the enactment of RSA 378:30(-a) (sic) are not at issue." *Id.* at 165. Thus, the rates collected after the order issued on May 25, 1978 in *Re Public Serv. Co. of N.H.*, 63 N.H.P.U.C. 127, and before the enactment date of RSA 378:30-a were left untouched.

Besides preventing the application of RSA 378:30-a to rates prior to May 7, 1979, the company asserts no other grounds for raising the issue of retrospective laws. As the post-enactment commission orders reveal, the company's argument against such application must fail.

IV. *Emergency Ratemaking*

In the third question we are asked to determine whether the mandate to exclude CWIP from a public utility's rate base under RSA 378:30-a restricts the commission's discretion to alter rates under emergency circumstances, as authorized by RSA 378:9, the emergency rate statute. Simply stated, is the commission statutorily authorized to ignore the restriction imposed by RSA 378:30-a when it has determined that an emergency exists for a public utility?

To answer this question we apply basic rules of statutory interpretation. When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not

contradict each other, *State v. Woodman*, 114 N.H. 497, 500, 323 A.2d 921, 923-24 (1974), and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. *McGrath v. City of Manchester*, 119 N.H. 109, 112, 398 A.2d 842, 844 (1979); *see also Swiezynski v. Civiello*, 126 N.H. 142, 148, 489 A.2d 634, 639 (1985) ("Where reasonably possible, statutes should be construed as consistent with each other."). Legislative history serves as a valuable aid in ascertaining the meaning of statutes, *Doe v. State*, 114 N.H. 714, 717, 328 A.2d 784, 786 (1974), and we resort to such aid where the statutes are ambiguous, *Appeal of Public Serv. Co.*, 125 N.H. at 52, 480 A.2d at 24.

As the commission noted in its order, PSNH could not receive an increase under the emergency statute without ignoring traditional ratemaking methodologies. *See* Report and Sixth Supplemental Order No. 18,873, at 14 n.2. Indeed, the parties agree that in the present case the PUC is not empowered to grant emergency relief simply to increase cash-flow without regard to the source of the cash shortage. In light of the source of the emergency, cash-flow ratemaking would simply be an effort to accomplish indirectly what the terms of the anti-CWIP law prohibit.

Nonetheless, the company argues that the emergency rate statute should be construed to override RSA 378:30-a when the source of the financial crisis is caused by the anti-CWIP law. To read the statutes differently, counsel for PSNH explains, would be to produce an inconsistent result; namely, preventing the commission from performing its constitutional duties to address the claims of unjust and unreasonable rates caused by the anti-CWIP law. Counsel suggests, therefore, that the balancing discretion is broader under the emergency rate statute.

To the extent that this argument assumes the unconstitutionality of applying RSA 378:30-a in the present circumstances, we have answered it in part II above. To the extent that it raises a new issue of statutory interpretation, we begin our inquiry with the examination of statutory language. *In re Robyn W.*, 124 N.H. 377, 379, 469 A.2d 1351, 1352 (1983). RSA 378:9 provides:

> "Emergency. Whenever the commission shall be of the opinion that an emergency exists, it may authorize any public utility temporarily to alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto."

The statute grants the commission broad discretionary powers. The commission may determine whether a state of emergency exists for a public utility or the public, increase or decrease rates, and disregard existing rules and regulations without requiring the customary complement of formal hearings and investigations. The statute does not define "emergency," but this court, in an earlier case, determined that emergency is synonymous with crisis and that "the Legislature . . . intended . . . to vest in the commission as a fact finding body wide discretionary powers to decide whether a crisis is of sufficient severity to warrant relief and if so the extent of relief." *Petition of Public Service Co.*, 97 N.H. 549, 550, 84 A.2d 177, 178 (1951).

The anti-CWIP statute, on the other hand, restricts the commission's discretionary powers in the ratemaking process. We examined the language of the statute in *Appeal of Public Serv. Co.*, 125 N.H. 46, 480 A.2d 20, and noted that each of the three sentences restricts the commission's discretion in some way. In brief, the first sentence prohibits the PUC from including CWIP costs in rates in "any manner;" the second sentence states explicitly that "at no time" may the commission base the rates on such costs while the construction work is incomplete; and the third sentence explains in particular what types of cost associated with CWIP may not be considered for ratemaking purposes until the project is actually providing service to customers. Read together, these provisions prohibit any rate to be based on investment in construction or plant that has never been placed in operation.

The one statute grants the commission general ratemaking powers under emergencies, and the other, enacted after the first, restricts the commission's discretion when determining rates. "When a conflict exists between two statutes, the later

statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152, 383 A.2d 1122, 1124 (1978). RSA 378:30-a was enacted after the emergency statute. The anti-CWIP statute is unconditional in its prohibition, and makes no exceptions for emergencies.

Our review of the legislative history leads to a similar conclusion—the anti-CWIP law applies to emergency circumstances. Although the legislative journals are silent with respect to the objective and scope of Laws 1913, 145:12, the predecessor of RSA 378:9, they are not silent with respect to RSA 378:30-a. Members of the Senate proposed amendments to the anti-CWIP bill (HB 155) during the April 1979 session. *See, e.g.*, N.H.S. Jour. 604-05 (1979). One amendment would have conditioned the deletion of CWIP charges so that it would occur when the New Hampshire public utilities' ownership in Seabrook fell under 50%. Another amendment would have provided protection to New Hampshire public utilities' ownership by granting the PUC discretion to include CWIP when necessary to protect the 50% ownership. Despite the concerns expressed by the proposing members of the Senate with respect to the financial integrity of New Hampshire's public utilities, particularly, PSNH, the amendments failed. No mention was made of using the emergency statute as an alternative. The discussions had by the members of the Senate indicate that there was no intention to provide an exception to the anti-CWIP law.

The company makes an erroneous assumption that the anti-CWIP statute has caused the existing rates to become unjust and unreasonable rates. We have concluded in response to questions 1 and 2 that the application of that statute to PSNH's present ratemaking proceeding is constitutional, which is to say that the anti-CWIP statute is also constitutional under emergency circumstances. Therefore, our interpretation of RSA 378:30-a and RSA 378:9 does not produce an illogical result, but rather, a consistent result which effectuates the legislative purpose of the statute.

V. *Conclusion*

In conclusion, we determine that the application of the anti-CWIP law to the facts presented to us by the company in this interlocutory transfer would not violate the provisions of either the New Hampshire or the United States Constitution. The same right to rates that the company had before anti-CWIP are the same rights that it has today. The anti-CWIP statute is a re-affirmation of the "used and useful" concept standing for the proposition that the direct consequences of investment risk for new plants must be borne by investors, not ratepayers. In the broad sweep of utility regulation and financing, fundamental changes in risk allocation are policy matters for the legislature rather than constitutional matters for the courts.

All concurred.

APPENDIX B

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Appearances: Martin L. Gross, Esq. of Sulloway, Hollis & Soden, Thomas R. Jones, Esq. of Cahill, Gordon & Reindel and D. Pierre G. Cameron, Jr. Esq. for Public Service Company of New Hampshire; Michael Holmes, Esq. and Joseph W. Rodgers, Esq. for the Consumer Advocate; Robert C. Hinkley, Esq. and Vaughn Tamzarian, Esq. of Hinkley and Hahn for the Campaign for Ratepayers Rights; Ian G. Wilson for the Business and Industry Association; Mark J. Bennett, Esq. for the City of Nashua, Town of Rye, and City of Manchester; Jeffrey J. Zellers, Esq. of Hall, Morse, Gallagher & Anderson for the New Hampshire Electric Cooperative, Inc.; Martin C. Rothfelder, Esq. for the commission staff and the commission.

Report

On August 5, 1987 Public Service Company of New Hampshire (PSNH) filed a petition to alter existing rates on account of emergency circumstances to produce an overall estimated increase in annual revenues of $70,973,279, an increase of 15% based on sales for the 12 months ended December 31, 1986. The PSNH petition contended that absent the requested relief it would have no choice but to seek protection from creditors under federal bankruptcy laws. It, therefore, requested the commission to transfer to the New Hampshire Supreme Court a question regarding the rights of a public utility in such circumstances, notwithstanding the restrictions of RSA 378:30-a:

> Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> (1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
>
> (2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
>
> (3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,
>
> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

The commission granted the PSNH request[1] and in addition, transferred the following two questions:[2]

> Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, regardless of RSA 378:30-a?
>
> Does the proper interpretation of RSA 378:9, which provides that the commission may "temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . ." when it finds that an emergency exists, allow the commis-

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1 Report Regarding Request for Transfer, Order No. 18,788 and Interlocutory Transfer Without Ruling (August 11, 1987).

2 *Id.*; and Tenth Supplemental Order No. 18,901 (November 5, 1987).

sion, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?

The court deferred accepting the transferred questions until the commission made findings of basic facts addressing the following issues:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the amounts of the company's investment prior to that date, between that date and the effective date of § [378:] 30-a, and thereafter.

The commission developed findings of fact related to the transferred questions for the court,[3] held numerous hearings, and heard oral argument on December 31, 1987. At the oral argument, PSNH supported granting the requested increase. The consumer advocate and CRR opposed the increase. The other parties in the case[4] did not appear at the argument. The com-

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3 Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Sixth Supplemental Order No. 18,873 (October 14, 1987); and Supplemental Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Ninth Supplemental Order No. 18,890 (November 2, 1987).

4 The other parties are: The Business and Industry Association of New Hampshire, the Department of Defense, the New Hampshire Electric Cooperative, the City of Nashua, the Town of Rye, and the City of Manchester.

mission also notes that it issued orders dealing with numerous other motions and procedural concerns during the case.[5]

Evidence heard after said findings of fact were forwarded to the supreme court showed that PSNH did not meet and was not meeting its cash obligations. Based on these findings the commission concludes that a financial emergency did and does exist.

On January 26, 1988, the supreme court[6] issued an opinion addressing the three questions transferred to the court. All were answered in the negative. Under that supreme court opinion and the findings of fact made in this case, the commission lacks authority to grant PSNH a rate increase. Thus, pursuant to state law, the commission finds that it must deny PSNH's request for a rate increase.

All other motions and requests before the commission that have not been previously ruled on are hereby denied.

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5 Order No. 18,801 (August 25, 1987); Report on Prehearing Conference of August 25, 1987 and Supplemental Order No. 18,805 (August 31, 1987); Supplemental Order No. 18,815 (September 31, 1987); Second Supplemental Order No. 18,812 (September 3, 1987); Report Regarding Consumer Advocate's Motion For Rehearing and Third Supplemental Order No. 18,827 (September 14, 1987); Report Regarding Consumer Advocate's Motion to Transfer and Fourth Supplemental Order No. 18,828 (September 14, 1987); Report Regarding CRR Request for Findings and Fifth Supplemental Order No. 18,832 (September 15, 1987); Report Regarding Consumer Advocate Motion for Clarification and Sixth Supplemental Order No. 18,865 (October 2, 1987); Sixth Supplemental Order No. 18,873 (October 14, 1987); Report Regarding Consumer Advocate's Motion to Compel and Seventh Supplemental Order No. 18,880 (October 21, 1987); Report Regarding CRR Motion to Compel and Eighth Supplemental Order No. 18,881 (October 21, 1987); Report Regarding Motion to Rehear Order No. 18,881 and Motion for Enlargement of Time and Eleventh Supplemental Order No. 18,911 (November 18, 1987); and Report Regarding Motions, Closing of Record and Post Hearing Argument and Twelfth Supplemental Order No. 18,935 (December 21, 1987).

6 *In re Public Service Company of New Hampshire*, N.H. Supreme Court Docket No. 87-311 (January 26, 1988).

Our Order will issue accordingly.

Concurring:

March 24, 1988

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

THIRTEENTH SUPPLEMENTAL ORDER NO. 19,042

Upon Consideration of the foregoing Report, which is made a part hereof, it is hereby

ORDERED, that this petition is dismissed and the requested rate relief is denied as is detailed in the foregoing Report.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of March, 1988.

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

Attested by:

Wynn E. Arnold
Executive Director and Secretary

APPENDIX C

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Report Regarding Request for Transfer

On August 5, 1987 Public Service Company of New Hampshire (PSNH) filed an APPLICATION TO ALTER EXISTING RATES ON ACCOUNT OF EMERGENCY CIRCUMSTANCES (the Application). Along with its application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court the controlling question of law, pursuant to RSA 365:20. This Report, the Order attached hereto, and the attached INTERLOCUTORY TRANSFER WITHOUT RULING grants the PSNH request for transfer but adds a second question of law to clarify the PSNH question.

The Commission recently concluded consideration of PSNH rates under New Hampshire Statutes in DR 86-122. In that Order the Commission made the following finding regarding PSNH's financial integrity and the operation of RSA 378:30-a:

> The Commission also finds that there is a lack of confidence in PSNH's financial integrity. However, this lack of confidence primarily stems from the interaction of PSNH's large investment in the Seabrook Nuclear Power Plant, the uncertainty of the operation of that plant due to NRC regulation, and the inability of PSNH to recover any part of the Seabrook investment in rates until that plant is in operation due to the operation of RSA 378:30-a. The record reflects that the PSNH investment in Seabrook is over four times the PSNH rate base. The uncertainty over this overwhelming component of PSNH's investment which is not under this Commission's control is the primary factor in PSNH's financial situation. Thus, the Commission is unable to substantially improve the confi-

> dence in PSNH's financial integrity via the setting of a rate of return.

Docket DR 86-122, *PSNH*, Report Regarding PSNH Motion for Rehearing and Seventeenth Supplemental Order No. 18,775, 9-10 (July 30, 1987). The Report and Order disposing of DR 86-122[1] and the Orders disposing of the Motions for Rehearing[2] indicate that PSNH did not request, and the Commission did not consider, placing construction work in progress in rate base as part of the process of developing just and reasonable rates for PSNH in DR 86-122. However, it seems that PSNH has placed this issue before the Commission at this time. Based upon the above quoted finding from docket no. DR 86-122 and the PSNH request, it seems likely that the Commission will need to know whether the Constitutional rights of PSNH allow or require the inclusion of portions of the PSNH Seabrook investment in rate base, despite the restrictions of RSA 378:30-a.

For these reasons and the reasons expressed in the attached INTERLOCUTORY TRANSFER WITHOUT RULING, the Commission transfers to the New Hampshire Supreme Court the question that PSNH has requested that we transfer. This question is as follows:

> Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,
>
> > (1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;
> >
> > (2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and
> >
> > (3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,

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1 Fourteenth Supplemental Order No. 18,726 (June 29, 1987.

2 Sixteenth Supplemental Order No. 18,774 (July 28, 1987) and Seventeenth Supplemental Order No. 18,775 (July 30, 1987.

> Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

The Commission also finds it appropriate to add a question to clarify the PSNH question. The Commission believes the PSNH question, as presented, could be narrowly read to address only PSNH's right to be heard. The Commission would find such information of little help if it did not also include information on PSNH's constitutional rights, if any, to *substantive* relief that RSA 378:30-a would otherwise prohibit. Thus, the Commission transfers the following additional question.

> Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, regardless of RSA 378:30-a?

Our Order will issue accordingly.

Concurring:

August 11, 1987

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

ORDER NO. 18,788

In consideration of the foregoing Report Regarding Request for Transfer and the attached INTERLOCUTORY TRANSFER WITHOUT RULING, which are incorporated herein by reference; it is

ORDERED, that the Commission will reserve, certify and transfer the questions of law listed in the foregoing report via its signing of the INTERLOCUTORY TRANSFER WITHOUT RULING attached hereto to the New Hampshire Supreme Court pursuant to RSA 365:20; and it is

FURTHER ORDERED, that PSNH shall, pursuant to Supreme Court Rule 9, file the appropriate number of copies of the INTERLOCUTORY TRANSFER WITHOUT RULING and its appendix with the New Hampshire Supreme Court.

By order of the Public Utilities Commission of New Hampshire this eleventh day of August, 1987.

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

Attested by:

Clair D. DiCicco
Assistant Secretary

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DR 87-151

Public Service Company of New Hampshire
Application to Alter Existing Rates on Account
of Emergency Circumstances

INTERLOCUTORY TRANSFER WITHOUT RULING

1. *Summary of the Case*

The petitioner, Public Service Company of New Hampshire (PSNH), has filed with the Public Utilities Commission an Application to Alter Existing Rates on Account of Emergency Circumstances (the Application). In conjunction with its Application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court a controlling question of law, pursuant to RSA 365:20.

In its Application, PSNH requests that on or before October 1, 1987, the Commission allow PSNH approximately $70.98 million in additional annual revenues in the form of an emergency rate surcharge. To produce such revenues, PSNH proposes that the Commission allow PSNH a special emergency rate base increment consisting of a portion of PSNH's investment at October 31, 1986 in Unit I of its plant under construction at Seabrook Station. PSNH has further requested that the Commission provide a special emergency rate of return thereon at 15.28%, PSNH's cost of debt capital as determined by the Commission in PSNH's most recent rate case, DR 86-122, Report and Order No. 18,726 (June 29, 1987).

A New Hampshire statute, RSA 378:30-a, specifies that public utility rates shall not in any manner be based on the cost of construction work in progress. The Commission is accordingly prohibited by statutory law from allowing any return on PSNH's construction work-in-progress investment in Seabrook Station. By its terms, RSA 378:30-a bars PSNH's requested Emergency Surcharge.

However, PSNH contends that in its present circumstances, its existing rates are not just and reasonable, and that notwithstanding RSA 378:30-a, it is entitled as a matter of constitutional law to a hearing to establish just and reasonable rates in accordance with the standards set forth in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). PSNH further contends that when a utility's financial integrity is at stake, *Hope's* result-directed methodology for determination of "just and reasonable rates" precludes the application of a regulatory standard such as RSA 378:30-a as a bar to recovery of a fair return on prudently-incurred investment. *Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission*, 810 F.2d 1168 (D.C. Cir. 1987).[1]

Based upon this argument, PSNH has asked that the PUC transfer the issue of its right to a hearing to establish rates necessary to restore its financial integrity to this Court. While perhaps it is implicit in the PSNH question, the PUC desires to make explicit its concerns that any answer provided by the court provide guidance to the Commission on under what circumstances, if any, do PSNH's constitutional protections either require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to consumers. Thus, the Commission has clarified the PSNH request with a second question regarding this concern.

The questions of law that the Commission is transferring are set forth in full below. Based upon the Commission's findings in its recently concluded PSNH rate case, and the PSNH affidavits filed with the emergency rate request, the Commission anticipates that the questions set forth are likely to control the outcome of the PSNH request for emergency relief in PUC Docket No. DR 87-151. The Commission has not yet held hear-

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1 The Commission is aware that there are counter arguments to the PSNH contention that the restrictions of RSA 378:30-a are unconstitutional. Most discussion and case law occurs in the context of cancelled plant which will surely never operate. *See e.g.* J. Drobak, "From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation", 65 *Boston Univ. Law Rev.* 65, 123-24 (1985).

ings in this matter. The Commission provides the basic facts that it accepts for purposes of this transfer as follows below.

II. *Statement of Facts Accepted for Purposes of Transfer*

1. PSNH is a public utility as defined in RSA 362:2 that engages in the business of generation, transmission and sale of electricity that is ultimately sold to the public. Such sales are at rates regulated by the Public Utilities Commission (PUC). RSA Chapter 378. (PUC Orders in PUC Docket No. DR 86-122).

2. PSNH has a substantial investment in the Seabrook generating station. Unit I of that generating station is a nuclear generating facility that has not begun providing service. Unit II was a partially constructed nuclear generating unit that was cancelled. (PUC Orders in PUC Docket No. DR 86-122).

3. On May 29, 1986, PSNH filed for a rate increase with the PUC. Based upon a record that included materials filed or presented from that date through May 1987, the Commission provided PSNH approximately a 5% increase in revenues effective January 1, 1987. In that case, the Commission found as follows:

> The Commission . . . finds that there is a lack of confidence in PSNH's financial integrity. However, this lack of confidence primarily stems from the interaction of PSNH's large investment in the Seabrook Nuclear Power Plant, the uncertainty of the operation of that plant due to NRC regulation, and the inability of PSNH to recover any part of the Seabrook investment in rates until that plant is in operation due to the operation of RSA 378:30-a. The record reflects that the PSNH investment in Seabrook is over four times the PSNH rate base. The uncertainty over this overwhelming component of PSNH's investment which is not under this Commission's control is the primary factor in PSNH's financial situation. Thus, the Commission is unable to substantially improve the confidence in PSNH's financial integrity via the setting of a rate of return.

Report Regarding PSNH Motion for Rehearing and Seventeenth Supplemental Order No. 18,775, at 9-10 (July 13, 1987).

4. In establishing rates, the Commission generally employs the following cost based formula: R = E + V(r). In that formula:

R = the level of revenues which the utility is permitted to recover from ratepayers.

E = the utility's Operating Expenses (*e.g.*, salaries and wages, maintenance costs, depreciation and taxes).

V = the utility's Rate Base (*e.g.*, the depreciated cost of plant in service, working capital and materials and supplies which have been supplied by the utility's debt and equity investors).

r = the rate of return allowed by the Commission established on the basis of the utility's cost of debt and equity capital.

The Commission utilized this method in setting rates for PSNH is docket no. DR 86-122. [PUC Orders in DR 86-122; *Appeal of PSNH*, 125 N.H. 46, 49-50 (1984).]

5. On August 5, 1987, PSNH filed with the PUC an Application to Alter Existing Rates on Account of Emergency Circumstances (the Application). In conjunction with its Application, PSNH has requested that the Commission reserve, certify and transfer to the New Hampshire Supreme Court a controlling question of law, pursuant to RSA 365:20. The Commission assigned docket no. DR 87-151 to this matter.

In its Application, PSNH requests that on or before October 1, 1987, the Commission allow PSNH approximately $70.98 million in additional annual revenues in the form of an emergency rate surcharge. To produce such revenues, PSNH proposes that the Commission allow PSNH a special emergency rate base increment of $464.5 million. According to the application, this increase would result from including approximately 27% of PSNH's investment at October 31, 1986 in plant under construction at Seabrook Station and providing special emergency rate of return thereon at 15.28%, PSNH's cost of debt

capital as determined by the Commission in PSNH's most recent rate case, DR 86-122, Report and Order No. 18,726 (June 29, 1987).

6. Affidavits filed with the Application includes statements that, on their face, would support the following findings:

a. PSNH has not paid a dividend to its common or preferred stockholders since April, 1984. Nevertheless, after meeting costs of current operations, PSNH's revenues derived from rates do not generate sufficient cash to cover all of its costs, including interest on outstanding debt, maturities and construction costs. Assuming no resumption of dividends and expenditures at levels budgeted and projected as of the first quarter of 1987, PSNH forecasts a net cash deficiency of $657 million for the period 1987-1989. In each year of that period, PSNH's interest payment obligations alone exceed its cash derived from internal sources. (Affidavit of Robert J. Harrison, pages 1-2).

b. In the absence of sufficient cash from internal resources to meet its obligations, PSNH's only other method of obtaining cash is through the sale of its securities, i.e., through external financing. (Harrison Affidavit, page 2.)

c. PSNH's access to external financing has become so restricted as to be unavailable or not available on reasonable terms. PSNH investment bankers have informed the Company that there is no substantial market for its securities under present conditions. (Harrison Affidavit, pages 2-5.) PSNH's unsecured 17-1/2% Debentures due 2004 were traded during the week of July 20, 1987 to provide an annual yield to maturity of 35%. In its present circumstances, PSNH is foreclosed from access to the capital markets for public utility financings. (Affidavit of Francis E. Jeffries, pages 1-3.)

d. As a consequence of its insufficient internal cash resources and lack of access to external financing, PSNH has no present prospects of obtaining the cash necessary to make interest payments as they come due, to pay off its ex-

isting debt as it matures, nor to pay for construction necessary for expansion of service to its customers. PSNH's earnings are insufficient to enable it to attract capital or to maintain its credit or otherwise to support its financial integrity. (Harrison Affidavit, page 4; Jeffries Affidavit, pages 1-3.)

e. Three separate reports have been prepared that address the prudence of PSNH's Seabrook investment.

Pickard, Lowe & Garrick, expert engineers and management consultants, were retained by PSNH to conduct an audit of the prudence of PSNH's project management of Seabrook. That audit, conducted for over a year, included a 1,700-page analysis of PSNH's performance and found the Seabrook Project to have been prudently managed and all costs prudently incurred.

Also, several of the other Seabrook Joint Owners independently retained Challenge Consultants to examine Seabrook Project management. Challenge Consultants also found PSNH to have managed the Project and to have incurred costs prudently.

Most recently, the New Hampshire Public Utilities Commission, in connection with its independent investigation of Seabrook Project management, retained Touche Ross & Co. and The Nielsen-Wurster Group, Inc., to conduct a full, independent audit of PSNH's prudence in its management and investment in the Seabrook project. After more than nine months of study, including more than 130 interviews of personnel of PSNH, Yankee Atomic Electric Company (the Owner's Agent for the Seabrook project), United Engineers & Constructors Inc. (the Architect/Engineer and Construction Manager for the project), as well as the Company's investment and commercial bankers, and after reviewing hundreds of thousands of documents, these auditors concluded that more than 93% of the Seabrook investment was prudently incurred, which in terms of PSNH's share amounts to more than $1.6 billion.

f. PSNH's requested emergency rate base of $464.5 million of its investment in Seabrook Unit 1 corresponds very closely to PSNH's investment in Seabrook Unit No. 1 as of May 1, 1979 (just before the effective date of RSA 378:30-a), plus financing costs on that pre-enactment investment in the meantime. Such pre-enactment investment plus financing costs through September 30, 1987 will amount to $458.9 million. (Harrison Affidavit, page 11.)

g. PSNH estimates that in the event its financial emergency is not resolved in timely fashion and if it conducted business as usual, it would run out of cash in mid-October, 1987. PSNH states that it has instituted a cash conservation program. The filing seems to indicate that these measures should enable PSNH to maintain a positive cash position through approximately the end of 1987. (Harrison Affidavit, pages 11-13 and attachments G-H.)

h. RSA 378:30-a became effective May 7, 1979 and since that time the Commission has allowed no internal return based upon PSNH's investment in Seabrook Station. RSA 378:30-a has caused an increase in the size of PSNH's Seabrook investment to support financing costs associated with earlier financings, thus compounding the entire amount. The compounding effect of interest on construction-related debt under RSA 378:30-a has also magnified the impact of delays in the operation of Seabrook Station of PSNH's need for external financing. (Harrison Affidavit, pages 6-7; Affidavit of Charles E. Bayless, pages 1-5; Affidavit of J. Peter Williamson, pages 1-8.)

III. *Questions of Law*

The following questions of law are transferred in accordance with RSA 365:20:

1. Where a public utility alleges that at its currently allowed rates as restricted by RSA 378:30-a,

(1) its cash provided from internal sources is insufficient to meet all requirements of the conduct of its business;

(2) its access to cash from external sources through sale of its securities is so restricted as to be unavailable upon reasonable terms, and

(3) accordingly, its earnings are insufficient to enable it to attract capital or to maintain its credit, or otherwise to support its financial integrity,

Is the public utility entitled to a hearing to establish a level of rates to restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30-a, the so-called "anti-CWIP" statute?

2. Does the U.S. Constitution or the N.H. Constitution require or allow the Commission to, when setting rates, include construction work in progress on a construction project in rate base before said construction project is actually providing service to customers, notwithstanding the requirements of RSA 378:30-a?

IV. *Reasons for Interlocutory Tranfer.*

PSNH's right to a hearing to establish just and reasonable rates, the constitutional concerns in setting constitutional rates, and the restrictions of RSA 378:30-a involves substantial questions of law. As was noted in the summary of the case provided above, arguments exist on both sides of these issues. The Commission believes the application or non-application of the restrictions of RSA 378:30-a are the central thrust of the PSNH question. Thus, the Commission has provided question 2 to assure the Court addresses these restrictions and does not solely address the right to be heard. The Commission is not empowered to resolve itself the question of the constitutionality of RSA 378:30-a as applied to PSNH's present situation. *Re PSNH*. 69 NHPUC 174, 178 (1984).

Because of the emergency circumstances alleged in the PSNH Application and supporting affidavits, PSNH has requested the immediate transfer of the question of law it drafted. For the same reason, the Commission has transferred both that ques-

tion and the second question listed above. Because the Commission has not yet held its first hearing on PSNH's Application, the Commission has not yet determined the parties to that proceeding. However, the Commission anticipates that PSNH's Application will be objected to and contested.

V. *Administrative Aspects of Case*

Attached in Appendix A are copies of pertinent constitutional and statutory provisions: U.S. Constitution amendment V; N.H. Constitution part 1, article 12; N.H. Constitution part 1 article 23; N.H. RSA 378:7; N.H. RSA 378:30-a. Also in Appendix A are the following three orders from PSNH's recently concluded rate case, Commission docket no. DR 86-122: REPORT AND FOURTEENTH SUPPLEMENTAL ORDER NO. 18,726 (June 29, 1987); and REPORT REGARDING CONSUMER ADVOCATE MOTION FOR REHEARING AND SIXTEENTH SUPPLEMENTAL ORDER NO. 18,774 (July 28, 1987); and REPORT REGARDING PSNH MOTION FOR REHEARING AND SEVENTEENTH SUPPLEMENTAL ORDER NO. 18,775 (July 30, 1987). Appendix A also includes the entire PSNH filing with the Commission: the PSNH cover letter, a PSNH Table of Contents, the PSNH rate application, the PSNH Proposed Tariff Page, the PSNH Affidavits, the PSNH Report Appendix, the PSNH Draft "Interlocutory Transfer Without Ruling", and the PSNH Memorandum of Law Supporting Right to Hearing and Relief. A copy of this "Interlocutory Transfer Without Ruling", Appendix A hereto and the attached Commission Report Regarding Request for Transfer and Order in docket DR 87-151 shall be hand delivered on this date to Counsel for PSNH, and the Attorney General's Office. The Commission has also provided copies of this material, without Appendix A, to all parties in PUC docket no. DR 86-122, PSNH's recently concluded rate case.

VI. *Counsel*

The name, address and telephone number of each lawyer in this case and the name of the respective clients are:

Lawyer			
Martin L. Gross, Esq. R. Carl Anderson, Esq.	Sulloway Hollis & Soden PO Box 1256 9 Capitol St. Concord, NH 03301	224-2341	Public Company of New Hampshire
Stephen E. Merrill, Esq. Attorney General Larry M. Smukler Senior Assistant Attorney General	Room 208 State House Annex Concord, NH 03301	271-3658	State of New Hampshire

Lawyers for any further parties the New Hampshire Supreme Court may allow.

Vincent J. Iacopino Chairman	Bruce B. Ellsworth Commissioner	Linda G. Bisson Commissioner

August 11, 1987

APPENDIX D

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Petition of Public Service Company of New Hampshire (Public Utilities Commission) the court upon September 2, 1987 made the following order:

On August 11, 1987, the Public Utilities Commission transmitted an interlocutory transfer without ruling in the course of its consideration of DR 87-151, an application of Public Service Company of New Hampshire to "alter existing rates on account of emergency circumstances." *See* RSA 365:20. The questions transferred relate to the constitutionality of applying RSA 378:30-a, the so-called anti-CWIP statute, which was construed on non-constitutional grounds in *Appeal of Public Service Company of New Hampshire*, 125 N.H. 46, 480 A.2d 20 (1984).

In order to clarify the issues to be raised, an officer of this court conducted a prehearing evaluation conference on August 25, 1987, attended by representatives of the Public Service Company, the Attorney General, the Consumer Advocate and the Campaign for Ratepayer's Rights. It is clear from the discussion at conference, as well as from documents submitted to the court, that the commission and the parties do not seek a general ruling about the constitutionality of the statute viewed on its face. Rather, they desire a determination of its constitutionality as applied to the company's investment in the Seabrook I nuclear reactor, with reference to two sets of factual circumstances that the company claims to be true:

a. That the application of § 30-a precludes the company from "obtaining the cash necessary to make interest payments as they come due, to pay off its existing debt as it matures, [and] to pay for construction necessary for expansion of service to its customers."

b. That the application of § 30-a to investment commenced before the effective date of the statute is impermissibly retrospective.

The court does not sit as a fact-finding body on such a case transferred by the commission, nor can it provide the commission with a merely advisory opinion. It is equally important to recognize that the court should not decide a constitutional question, or a question on constitutional grounds, unless it is necessary to do so. The court therefore requires the commission to make findings sufficient to provide a factual basis for transferred constitutional questions, when those questions rest upon specific factual claims. The court made this plain over three years ago, when the commission and the company first sought a ruling on the constitutionality of § 30-a, without reference to findings of fact. In *Appeal of Public Service Company of New Hampshire, supra* at 48, 480 A.2d at 21, the court limited its answer to a transferred question about that statutory section "to the interpretation of the statute without regard to the constitutionality of its application, since the factual record was insufficient for informed consideration of constitutional issues."

The present interlocutory transfer does not satisfy the requirement to provide a factual basis. The commission has described the circumstances only by reference to "[a]ffidavits filed with the application [including] statements that, on their face, would support" certain findings. The court is thus being asked to make constitutional rulings of great import on the basis of specific facts that the commission has not found to be true and that are not otherwise before the court. This the court may not lawfully or responsibly do.

The court therefore defers acceptance of the transferred questions until the commission has addressed the following issues with findings of basic facts:

a. The claimed need to include some of the company's investment in the Seabrook I reactor in the company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due, to pay off existing debt as it matures and to pay for the expansion of services to customers.

b. The date upon which the commission first authorized inclusion of such investment in the rate base, and the

amounts of the company's investment prior to that date, between that date and the effective date of § 30-a, and thereafter.

Although it would not be appropriate for the court to set any schedule within which the commission should respond with such findings, the court is of the opinion that the findings can be made expeditiously after a hearing promptly convened and limited to the issues in question. Once the findings have been made, the court anticipates giving expedited consideration to the proferred transfer. All responsive pleadings filed in connection with the transfer will be held in abeyance to be docketed upon receiving the commission's response. Such pleadings may be amended not later than 5 days after the court's acceptance of the transferred questions.

RALPH H. WOOD

Ralph H. Wood, Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Petition of Public Service Company of New Hampshire (Public Utilities Commission) the court upon September 2, 1987 made the following order:

Motion for leave of court to file brief for amici curiae New Hampshire Electric Cooperative, Inc. is denied.

Ralph H. Wood,
Clerk

APPENDIX E

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order

Appearances: Martin L. Gross, Esq. of Sulloway, Hollis & Soden and Thomas R. Jones, Esq. of Cahill, Gordon & Reindel for Public Service Company of New Hampshire; Michael Holmes, Esq. and Joseph W. Rodgers, Esq. for the Consumer Advocate; Robert C. Hinkley, Esq. and Vaughn Tamzarian, Esq. of Hinkley and Hahn for the Campaign for Ratepayers Rights; Ian Wilson for the Business and Industry Association; Mark Bennett, Esq. for the City of Nashua, Town of Rye, and City of Manchester; Jeffrey J. Zellers, Esq. of Hall, Morse, Gallagher & Anderson for the New Hampshire Electric Cooperative, Inc.; Martin C. Rothfelder for the commission staff and the commission.

The commission opened this docket on August 5, 1987 pursuant to a petition by Public Service Company of New Hampshire (PSNH) to alter existing rates due to emergency circumstances. In addition to requesting such rate relief, PSNH requested that the commission transfer a question of law to the New Hampshire Supreme Court pursuant to RSA 365:20. On August 11, 1987, the commission transferred to the supreme court two questions related to the PSNH request pursuant to RSA 365:20. Report Regarding Request for Transfer and Order No. 18,788 (August 11, 1987). PSNH filed the statement regarding the transfer of these two questions with the New Hampshire Supreme Court on August 13, 1987. On September 2, 1987, the court deferred acceptance of the transferred questions until the commission has addressed two issues with findings of basic

facts. This Report and Order, and the forthcoming supplement to it as indicated below, constitutes our findings pursuant to that Order.

I. *Procedural History*

On September 3, 1987, the commission issued Second Supplemental Order No. 18,812 setting procedural aspects of this proceeding to deal with the September 2, 1987 order of the supreme court. Among other things, Order no. 18,812 set September 16, 1987 as the date for a hearing to develop a record to allow the commission to make findings of basic facts regarding the issues set forth by the supreme court in the September 2, 1987 Order. On September 4, 1987, the consumer advocate filed a motion for rehearing of Second Supplemental Order No. 18,812. The commission denied the consumer advocate's motion for rehearing of Second Supplemental Order No. 18,812 on September 14, 1987 in Third Supplemental Order No. 18,827.

On September 8, 1987, the consumer advocate filed a motion to transfer certain questions to the supreme court, which request was denied in Fourth Supplemental Order No. 18,828 (September 14, 1987).

On September 14, 1987, the Campaign for Ratepayers Rights (CRR), as did several other parties, made a filing to request that the commission make various findings of fact as a result of its proceeding set for hearing on September 16, 1987. Before the hearing on September 15, 1987, the commission denied CRR's request. The commission held hearings on September 16, 17, and 21, 1987 for the purposes of developing a record to make findings of fact related to the issues delineated by the September 2, 1987 supreme court Order.

At various times before and after the hearing the commission has received one or more filings on requests for findings from PSNH, CRR, and the consumer advocate. On September 22, 1987, PSNH submitted additional material in response to a request by Commissioner Bisson and asked that it be considered as an exhibit. On September 24, 1987 the consumer advocate filed a request that the commission consider certain responses to eight data requests as an exhibit in this proceeding and that

the commission accept as an exhibit a revision to exhibit 19. The consumer advocate has also filed material requesting that certain portions of the transcript be stricken. This request follows up on his motion to strike that he filed on September 17, 1987, which was granted by the commission, Commissioner Bisson dissenting, with clarification on stricken portions of transcript to follow. (Tr. Sept. 17, 1987, pp. 2-28 through 2-29). The commission takes action with regard to outstanding motions *infra*.

II. *The Supreme Court Order*

The Court deferred acceptance of the transferred questions until the commission has addressed the following issues with findings of basic facts:

> a. The claimed need to include some of the Company's investment in the Seabrook I reactor in the Company's rate base in order to obtain the cash required by the end of 1987 to make interest payments as they come due to pay off existing debt as it matures and to pay for the expansion of services to customers.
>
> b. The date upon which the Commission first authorized inclusion of such investment in the rate base, and the amounts of the Company's investment prior to that date, between that date and the effective date of § 30-a (sic) and thereafter.

Hereinafter, these two issues will be referred to as "issue a" and "issue b", respectively. The court stated that it "is of the opinion that the findings can be made expeditiously after a hearing promptly convened and limited to the issues in question." The court further indicated that it anticipated providing expedited consideration to this matter after the commission has made findings. From this direction, the commission makes the findings of facts expressed below.

The various parties to the proceedings, to some extent, disagreed as to what the Court required by the two issues it had delineated. For example, "issue a" was read in various ways with regard to the meaning of "the claimed need". For example, it was unclear whether the "claimed need" was the need to

place an item in rate base to provide additional dollars, or whether the Court wanted us to find either qualitative or quantitative facts about PSNH's claimed need for revenues. Thus, the findings of fact below attempt to provide findings which would answer all of those potential readings of that first issue area, except for an exact quantitative answer. Similarly, "issue b" was read in different ways with regard to what information and what dates were desired. Again, the commission has made findings of fact to provide a factual basis for various readings of issue b.

III. *Motions to Strike and Motions to Consider Additional Material*

On September 24, 1987, the consumer advocate indicated that in response to the commission's directions concerning the motion to strike that was granted on the record on September 17, 1987, lines 2-7, on page 162 of the transcript for day one should be stricken from the record. PSNH responded and indicated that it had no objection to that request. The consumer advocate has not identified any other portions of the transcript on any other day to be stricken. The commission finds the consumer advocate's request reasonable and strikes the above mentioned portion of the transcript.

Also on September 24 the consumer advocate requested that PSNH responses to eight data requests be considered as an exhibit. Those data requests are:

a. PSNH Response to OCA-137 (4 pages)
b. PSNH Response to OCA-138 (3 pages)
c. PSNH Response to OCA-139 (4 pages)
d. PSNH Response to OCA-140 (16 pages)
e. PSNH Response to OCA-141 (1 page)
f. PSNH Response to OCA-142 (1 page)
g. PSNH Response to OCA-143 (2 pages)
h. PSNH Response to OCA-144 (1 page).

The consumer advocate further requested that revised Attachments 1 and 2 to Exhibit 19 be accepted as an additional exhibit in this matter and marked as Exhibit 19A. The commission has

received no objection to these two requests for exhibits. The request seems reasonably related to various information which the consumer advocate became aware of late in the proceedings. For these reasons, the commission finds the request reasonable and grants the request for the exhibits.

CRR attached eight exhibits to a filing of September 25, 1987 designated as its requests for findings. CRR designated these exhibits as A-I. They are not part of the record in this case. CRR has not requested that the commission either take notice of these matters or consider them as evidence in this proceeding. Nevertheless, CRR certainly anticipated commission use of them, for it relies upon them in its requested findings of fact. The commission generally does not encourage unanticipated late filed exhibits for consideration in a proceeding and, further, generally requires a clear request by a party as to how they would like any such materials treated. The attachments seem to go to the issue of stockholder expectations for recovery in Seabrook I. The commission finds that this issue is not relevant to the issue areas delineated by the court. Thus, the commission declines to consider these exhibits.

On September 23, 1987, PSNH submitted an eight page response (including the cover letter) to a request for information from Commissioner Bisson. The exhibit also revises an investment number to which PSNH witness Wiggett testified. Since the document is one requested by the commission and is relevant to developing findings on PSNH's investment in Unit I, the commission shall consider this submittal as an exhibit.

IV. *Findings of Fact on Issue a*

With regard to issue a, PSNH takes the position that additional revenues must be raised through rate relief in order to provide service to customers, to make interest payments as they come due, to pay off existing debt as it matures, and to pay for expansion of service to customers. PSNH contends that its cash deficiency cannot be met from external financing sources, that application of conventional ratemaking methods will not meet its needs and that, absent an allowed return of approximately 52.8% on equity, inclusion of a portion of PSNH's investment

in Seabrook is necessary to produce sufficient increased revenue to meet its cash deficiency.

CRR asserts that inclusion of Seabrook in rate base is not necessary because other parts of the formula for developing a revenue requirement may be adjusted to provide additional revenue.

The consumer advocate takes the position that the commission should find that there is no need to include some of the Company's investment in Seabrook I reactor in rate base by the end of 1987. The consumer advocate bases his position on evidence which he states indicates that PSNH will have cash available at the end of 1987 due to various PSNH actions as well as the weakness of PSNH's evidence to back-up evidence on cash deficiency.

With regard to issue a, the Court has focused on the cash needed to make interest payments as they come due, to pay off debt as it matures, and to pay for the expansion of services to customers. This constitutes a part of the overall cash obligations of PSNH. PSNH must also pay for fuel expense, payroll and a myriad of other items. The commission finds it unlikely that PSNH would be in a position to meet the cash obligations that the court has listed, along with its other cash obligations, at the end of 1987 without cash beyond that provided by current rates.

The commission believes the evidence indicates that there are usually only two sources of funds for PSNH: external financing and rates. The commission finds that the financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of the high risk of PSNH. It is possible that the financial markets would be willing to obviate PSNH's need for cash by restructuring the existing debt obligations. PSNH is currently attempting to negotiate such action, but does not anticipate that it will occur before January 1, 1988. As part of those actions, PSNH anticipates not paying a 39 million dollar interest payment due on October 15, 1987.

An increase in current rates could be provided by this commission or the Federal Energy Regulatory Commission (FERC). This commission is unaware of any proceeding before

the FERC for an increase in the PSNH wholesale rates. In addition, the vast majority of the PSNH revenues come from retail sales under rates that are under the New Hampshire's PUC's jurisdiction.

The record reflects two rate related sources of cash in the New Hampshire jurisdiction other than an increase in current rates awarded by this commission. First, there is the potential of delaying a refund that PSNH owes to ratepayers as a result of its placing rates into effect under bond pursuant to RSA 378:6, paragraph III in docket DR 86-122. In that case, the commission subsequently found that the appropriate level of rate relief for PSNH was less than the bonded rates PSNH had placed into effect pursuant to RSA 378:6 III. Thus, PSNH is required to refund the overcollection under the bonded rates, with said refund to be provided to customers primarily through bill credits in November, 1987, a date established by an agreement among the parties and approved by the commission in docket no. DR 86-122. The evidence indicates that this refund, along with the interest that will be paid to customers, is reasonably calculated to be approximately $21,210,796. The evidence further reflects that delay of this refund past year end would probably result in PSNH being able to continue to meet its cash obligations into 1988. PSNH's continued ability to meet its obligations in 1988 minus rate relief would require successful restructuring of its debt to substantially reduce required interest payments. PSNH has not requested authorization to delay these refunds, and the commission does not intend to, *sua sponte*, authorize delay of these refunds.

A second, albeit theoretical, source of additional revenues for PSNH would be rate relief related to successful appeal of its recent rate case, NHPUC docket no. DR 86-122. PSNH has appealed the commission's finding in DR 86-122 on cost of capital and on a rate base adjustment related to deferred taxes. Those issues have a value of $13,967,941 and $444,921 on an annual basis, respectively. If PSNH prevails on these issues, the revenues resulting from this would not achieve the revenues that PSNH currently claims is necessary. Unless otherwise ordered by the Court, it is proper to assume that the commission's Or-

der in DR 86-122 is lawful and valid. The commission does not anticipate action on the appeal by the supreme court before year end. Thus, under the time assumptions above, and even under the assumption that PSNH does prevail in its appeal, this option does not seem to provide a route to provide timely additional cash for 1987.

The third and most realistic method of providing additional cash to PSNH is a rate increase. The commission traditionally provides rate relief by applying the following formula:

R = E + (V-d)r, where:

R = Operating Revenues (the Revenue Requirement)

E = Operating Revenue Deductions (Operating Expenses)

V = Value of Rate Base (plant in service and working capital)

d = Accrued or Accumulated Depreciation

r = Rate of Return (return on rate base)

The legislature seemed to anticipate, if not require, continued use of this methodology in adopting RSA 378:30-a, for the statute particularly mentions rate base and expense. The supreme court decision in *Appeal of Conservation Law Foundation*, 127 N.H. 606, 633-34 (1986) seems to indicate that this formula is the methodology for this commission to set rates. *See also*: *Appeal of PSNH*, 125 N.H. 46, 49 (1984). The commission recently concluded a traditional rate case for Public Service Company of New Hampshire using this traditional formula and awarding rate relief pursuant thereto. Docket No. DR 86-122, Report and Fourteenth Supplemental Order No. 18,726 (June 29, 1987).

Testimony in this case indicates that there are three methodologies within traditional rate making to adjust the formula and thereby result in a higher revenue requirement and higher rates for PSNH. First, portions of the company's investment in plant that 378:30-a does not allow in rate base, such as the Seabrook nuclear reactor unit I, could be included in rate base and would thereby provide for an increase in revenue requirement. This

would occur because PSNH would then earn on a larger share of its investment.

Second, PSNH's expenses could be adjusted to reflect costs of the capitalization (debt and equity) that currently are not covered in the development of revenue requirement. Under current ratemaking as constrained by RSA 378:30a, the Company's weighted cost of capital is applied to the rate base as constrained by RSA 378:30-a. However, PSNH's capitalization unquestionably exceeds its rate base and therefore the return on current rate base is substantially less than the return needed to service the capitalization. Expenses could be adjusted to reflect the debt service or return on equity, or both, in the capitalization that is now not currently reflected in rates. However, adjusting expense to cover capitalization in excess of that reflected in the rate base would result in covering capitalization related to the Company's investment in plant which is not yet or will not be providing service to customers (such as Seabrook I or Seabrook II). Reflecting such costs in expenses would result in the financing costs of such non-operating plants to be reflected in rates. The commission believes that RSA 378:30-a prohibits such action.

Third, the commission could enhance the Company's return on equity in order to increase the return on investment allowed in rate base under RSA 378:30-a. Testimony in this case indicates that to achieve the requested rate level would require authorizing the Company to earn 52.08% on equity. Adjustments for tax might lower that to approximately 34% on equity.[1] Both such returns on equity (52.08% and 34%) are far above the bounds that historically have been, or should be, awarded a utility. In the commission's opinion, authorizing such a return would merely circumvent the restrictions of RSA 378:30-a or, in other words, do indirectly what RSA 378:30-a prohibits the commission from doing directly. The supreme court has already indicated, in *Appeal of PSNH*, 125 N.H. 46, 55 (1984), that the commission may not adjust the rate of return to circumvent

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1 This approximate calculation is developed by taking the 52.08% in the testimony and multiplying it by (1.00-.34). The .34 is the federal tax rate.

RSA 378:30-a. Thus, adjusting the rate of return for PSNH as discussed above also seems to be prohibited by RSA 378:30-a.

Based on the foregoing, the commission finds that to put PSNH in a position where it is reasonably likely to meet its cash obligations including making interest payments as they come due under current obligations, paying off existing debt as it matures and paying for expansion of services for customers, PSNH would need additional revenues from a rate increase. Such rate relief need not necessarily be provided by adding a portion of the company's investment in Seabrook 1 in the company's rate base; but one or more of the following three methodologies must be utilized under traditional ratemaking to provide such revenues: inclusion of construction work in progress in rate base, enhancement of expenses to reflect capitalization that exceeds the allowable rate base, or enhancement of the rate of return. As discussed above, all such actions seem to violate the dictates of RSA 378:30-a and supreme court cases related thereto.[2]

V. *Findings of Fact on Issue b*

The first aspect of issue b asks for a finding of "the date upon which the commission first authorized inclusion of 'such investment' in rate base". The commission assumes that the term "such investment" focuses upon investment in the Seabrook I nuclear power plant referred to in issue a.

With regard to that issue, on May 25, 1978 the commission issued Report and Eleventh Supplemental Order No. 13,162 in docket no. DR 77-49, *Re: Public Service Company of New Hampshire*, 63 NHPUC 127 (1978). In that Report and Order, the commission first authorized the inclusion of construction work in progress in rate base for PSNH effective "with all bills based on successive meter readings, the latter of which is taken

2 The commission also notes that PSNH has not made a filing for a permanent rate increase. Uncontradicted testimony of staff witness Voll indicates that pursuit of rate relief based upon traditional criteria would not result in a "meaningful increase" in rates. The Commission finds that testimony and Dr. Voll's analysis reasonable. Thus, PSNH has asked for emergency rates that it clearly would not receive under traditional ratemaking.

on or after June 1, 1978.''[3] That order authorized construction work in progress to be included in rate base for the accumulated costs of Seabrook (both units I and II), Wyman No. 4, Millstone No. 3, and Pilgrim No. 2). Reports and Orders of this commission indicate that: 1) Seabrook No. I is a nuclear generating plant that today is near or at completion and awaiting a license from the Nuclear Regulatory Commission; 2) Seabrook No. II was a nuclear generating plant which was partially built and then cancelled; 3) Wyman No. 4 is an oil generating unit that is currently operating and in PSNH's rate base; 4) Millstone No. 3 is a nuclear generating unit of which PSNH owns a minority share, that is currently operational, and that was first included in PSNH's rate base in PSNH's last rate case, DR 86-122; and 5) Pilgrim No. 2 is a cancelled nuclear generating station upon which construction was begun but which was cancelled prior to completion. Reflection of the Wyman and Millstone plants in PSNH's rate base would include only PSNH's investment and not the investment of any co-owners.

The second part of issue b focuses on the amounts of the company's investment on specific dates. In response to this part of issue b, in these updated hearings parties presented information, to the best that could be determined, on PSNH's investment in Seabrook I at various dates. During the course of presentation of this data, it became clear that there are some discrete issue areas that make developing precise figures on PSNH's investment in Unit I more difficult than the court may have anticipated.

The source of the basic data that all parties relied upon is the information PSNH receives from the Seabrook project management as to total cash expenditures made at the project. Those cash expenditures are broken down into the cost of procuring and constructing Seabrook Unit I, the cost of procuring and constructing Seabrook Unit II, indirects, common plant, nuclear fuel, and land. Common facilities are facilities that service both Unit I and Unit II. Indirects consist of both labor and material which are defined as follows. Indirect labor is labor

3 PSNH, the Consumer Advocate and the Staff all indicate through testimony or pleadings a position that agrees with this finding.

used at the construction site that does not actually work on the units. Indirect materials are materials utilized at the construction site that do not actually become a part of the Units.

PSNH witness Wiggett indicated that the PSNH investment amounts presented in his testimony reflect combining the entire amount of Seabrook Unit I construction procurement costs, an allocation of indirects, and 100% of the cost of common facilities. The consumer advocate witness relies on the same basic data, but adjusts the investment numbers downward for a change in the PSNH ownership of the Seabrook station, for the education center, and for the termination yard. The staff witness relies on the same data and makes adjustments for the same three reasons.

The commission finds there are six general areas of controversy regarding these numbers based on the record before it. In the commission's opinion, indirects and common facilities present problems of allocation between Unit I and Unit II. The factual circumstances and the contentions of various parties contentions relating to the "educational center" and the "termination yard" also need to be addressed. Matching the dates of interest to the court to the investment data also present an issue as does PSNH's change of ownership from 50% to 35.56942%.

With regard to indirects, the record is not well developed on the methodology by which allocations were made between Unit I and Unit II. However, testimony of PSNH's witness indicates that the allocation to Unit I was more conservative than that advocated by an outside auditor hired by the Seabrook joint owners. Other witnesses for the staff and the consumer advocate accepted Mr. Wiggett's allocation and utilized it in developing their numbers. Thus, while the commission is concerned over the lack of a thorough record on the allocation mechanism, the commission finds that the allocation of indirects to Unit I is reasonable for the limited purpose at hand.

Each witness testifying on Seabrook Unit I investment included all the common plant at Seabrook Station as investment in Unit I. According to PSNH, 100% of the common plant should be applied to the Unit I investment. The witnesses for

the staff and the consumer advocate utilized this presentation of numbers and data that PSNH had provided and thereby also applied all of common plant to Unit I. As discussed above, common plant in the context of this case is plant common that was designed and built to service both Unit I and Unit II. An example is the tunnel at the Seabrook facility to carry cooling system water that was designed and built with capacity sufficient to serve both Units 1 and II.

PSNH witness Wiggett indicated that the accounting for common facilities is in accordance with the FERC regulations and standards within the industry. However, upon review the FERC Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 CFR part 101, there appears to be only one regulation dealing with common plant. That regulation, 18 CFR part 101, at 334; I FERC Statutes and Regulations ¶ 15,063, seems to address utility plant that is utilized for more than one utility service, (e.g. plant used for both service electric and gas), or plant that is used for both the relevant utility service and for non-utility services. With regard to such plant, the regulations indicate that allocations of such plant should be made among the various uses. The regulation also discusses the expenses related to common utility plant and requires an allocation of those as well. Based on our reading of the FERC regulation on the system of accounts, which this commission has adopted,[4] the regulation does not directly address accounting for plant that is common between two electric facilities. However, with regard to common plant, the regulation clearly follows the general concept of a reasonable allocation between the uses of common plant.

At the specific times of interest to the court—the time frame when the commission allowed CWIP in rate base and the effective date of the anti-CWIP statute—the joint owners were constructing both Unit I and Unit II. Based on that fact, and the lack of any other credible allocation between Unit I and Unit II, the commission finds it most reasonable to split the common plant in half between Unit I and Unit II for purposes of this

4 N.H. Admin. Rules, Puc 307.04.

docket.[5] However, the commission does not have in the record before it investment figures indicating the investment in common plant that PSNH included as part of Unit I. The commission deals with that data problem *infra*.

The consumer advocate and staff witnesses both reduced the PSNH recommended number on investment in Unit I by the cost of the education center located at Seabrook Station. PSNH included amounts in its investment costs that reflected its estimate of the investment in the center at the time of the data.

The education center is a center designed to provide education for the general public. The education provided, according to the Company witnesses, relates to Seabrook Station and nuclear power in general. The education center is currently in operation, and was allowed in rate base.

The commission finds that allocation of the education center to the Seabrook project is reasonable. The commission further finds it appropriate to allocate all of this item to the first unit that PSNH is expected to complete. Thus, allocating the entirety of the education center to Unit I is reasonable. PSNH's estimates of its actual invested amounts shall be utilized for this purpose.

The consumer advocate and staff witnesses both excluded the cost of the termination yard from the PSNH advocated numbers on investment in Unit I. PSNH included in its investment numbers costs that reflected its estimate of the investment in the termination yard at the time of the data. The termination yard is the main switching yard in the Seabrook Station. The plant there allows Seabrook owners to get Seabrook power, if and when any is produced, into the transmission grid. The plant provides the additional function providing additional needed transmission capacity from northern to southern New England. For the purpose of this proceeding, the commission, based on the record before it, finds it reasonable to allocate all of that termination yard to the Seabrook project and also finds it reasonable to allocate 100% of this plant to the first unit that

5 The Commission makes no finding here regarding the appropriate method to allocate plant for purposes of rate base once one plant of a two plant project is cancelled and the other is operating.

PSNH anticipated completing: Unit I. As with the education center, the PSNH presentation reflects the actual investment in the termination yard at specific dates. Thus, the PSNH data shall be used for investment in the termination yard.

The Court specifically requested the company's investment in the Seabrook I reactor prior to the date at which the commission first authorized inclusion of that investment in rate base. PSNH took the position that this request asks for the company's investment at the date of the issuance of the above referenced commission order authorizing CWIP in rate base. The staff, in response to that order, presented information on the investment included in rate base in that particular order, rather than the company's investment on the order's issuance date. The consumer advocate, in his request for findings, presents information on both. In addition, PSNH, responded to the evidence put in the record by the staff by placing into evidence data relating to investment included in the rate case that the order related to.

The commission finds that the words expressed in issue b request a finding on the company's investment on the date the commission issued its order first authorizing CWIP in rate base. However, reading issue b in context, it is also reasonable to conclude that the court may be interested in the investment that was authorized in the order. Thus, the commission makes findings in its schedule below that indicate the investment allowed in the order. Those numbers show PSNH's investment at April 30, 1977—the date for the end of the test year utilized for that rate case. In addition, the schedule below will reflect findings on PSNH's investment at May 31, 1978, six days after the commission formally authorized inclusion of such investment in rate base by its Order No. 13,162 (May 25, 1978). The divergence of the six days is required due to the monthly nature of the data that PSNH has and the fact that May 31, 1978 is the closest day to the date that the Court seems to be interested in.

RSA 378:30-a became effective on May 7, 1979. All parties seem to agree that this order should find PSNH's investment in Unit I on this date. Due to the monthly nature of the PSNH investment data, there is no evidence on investment for that pre-

cise date. Thus, the schedule below reflects findings for investment on April 30, 1979—seven days prior to the effective date of RSA 378:30-a.

In addition, the supreme court has asked for investment "thereafter". In response to that request, the commission has in its schedule below, developed investment totals on an annual basis. Throughout this period the commission has utilized the allocations discussed above.

The consumer advocate and staff presented testimony indicating that the numbers reflecting PSNH's investment in Seabrook I should be adjusted to reflect the eventual change in PSNH's ownership of Seabrook from 50% to 35.56942% after the enactment of RSA 378:30-a. In contrast, PSNH insists that the court asked for PSNH's investment and that subsequent action does not affect their investment in Seabrook in those earlier dates.

Uncontradicted evidence in the record indicates that PSNH engaged in transactions designed to reduce their ownership percentage in the Seabrook Unit I from 50% to 35.56942%. However, even at the time of those transactions, PSNH's cash investment did not decline. Instead, the change in PSNH's ownership was carried out by reducing PSNH's cash payments to the project in the time periods after the transaction took place. The commission agrees that if what the court wants is clearly PSNH's investment, the actual historical investment numbers should not be adjusted for a subsequent change in PSNH's ownership level. However, these historical investment numbers may or may not be the amount appropriate for consideration if the commission attempts to develop a pre-RSA 378:30-a rate base for ratemaking purposes. Thus, the commission declines to make an adjustment in its findings to reduce the amounts of historical investment to reflect the investment that would have existed at a 35.56942% ownership level.[6]

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6 Adjusting the historical investment to investment that would have existed at the 35.56942% level requires the investment to be multiplied by

$$\frac{35.569.42.}{50.0}$$

Based on the foregoing discussion, the commission provides the schedule below of PSNH investment. The investment numbers are not complete and need to be supplemented by subtracting 50% of PSNH's common plant from them. To determine the amount of common plant, the commission directs all active parties to this proceeding to appear in an additional conference of the parties at 9:00 a.m. on October 16, 1987. PSNH shall attempt to provide the active parties in this proceeding with appropriate figures for 100% of common plant, including associated AFUDC, at all the dates listed below at least 24 hours before this conference. The commission would expect parties to report on whether they can agree on those numbers or whether further procedures need to be developed to create a record or an agreement on those numbers at 10:00 a.m. on October 16, 1987. The commission shall, as soon as possible, supplement this order with the information on common plant and then consider its task complete with regard to the supreme court September 2, 1987 Order.

The schedule of PSNH investment in Seabrook Unit I, pursuant to issue b and as discussed above, is as follows:

PSNH INVESTMENT IN UNIT I

Date	*PSNH Investment in Unit I*
04/30/77	$ 70,806,950 - (50% of common plant)
05/31/78	165,651,870 - (50% of common plant)
04/30/79	237,968,598 - (50% of common plant)
12/31/79	320,092,938 - (50% of common plant)
12/31/80	454,718,761 - (50% of common plant)
12/31/81	495,159,536 - (50% of common plant)
12/31/82	675,373,109 - (50% of common plant)
12/31/83	940,656,402 - (50% of common plant)
12/31/84	1,184,255,352 - (50% of common plant)
12/31/85	1,468,061,969 - (50% of common plant)
12/31/86	1,765,265,460 - (50% of common plant)
07/31/87	1,919,311,861 - (50% of common plant)

Our Order will issue accordingly.

Concurring:

October 14, 1987

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

CONCURRING OPINION OF COMMISSIONER LINDA G. BISSON

I concur with the foregoing decision of the majority but for the following clarification. For purposes of this proceeding I agree that, in the fullest interpretation of the term "investment", the Seabrook I construction costs and related AFUDC are $1,919,311,861. However, PSNH's investment in the education center ($884,370) and in the termination yard ($6,995,909) has been included in the Company's rate base for several years and should be deleted. Therefore, I believe that the following schedule more accurately reflects the Company's investment levels.

		Adjustment for Assets Subsequently Placed in Rate Base		
Date	*Investment*	*Ed Ctr.*	*Term Yard*	*Adjusted Investment*
04/30/77	70,806,950	136,004	213,333	70,457,613*
05/31/78	165,651,870	890,433	956,318	163,805,119*
04/30/79	237,968,598	1,063,924	659,723	236,244,951*
12/31/79	320,092,938	1,124,722	4,857,386	314,110,830*
12/31/80	454,718,761	1,146,217	7,252,975	446,319,569*
12/31/81	495,159,536	1,148,573	7,252,975	486,757,988*
12/31/82	675,373,109	1,161,072	6,995,909	667,216,128*
12/31/83	940,656,402	884,370	6,995,909	932,776,123*
12/31/84	1,184,255,352	884,370	6,995,909	1,176,375,073*
12/31/85	1,468,061,969	884,370	6,995,909	1,460,181,690*
12/31/86	1,765,265,460	884,370	6,995,909	1,757,385,181*
07/31/87	1,919,311,861	884,370	6,995,909	1,911,431,582*

*Less 50% Common Plant

LINDA G. BISSON

Linda G. Bisson
Commissioner

October 14, 1987

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

SIXTH SUPPLEMENTAL ORDER NO. 18,873

Upon consideration of the Report Regarding Findings Pursuant to September 2, 1987 supreme court order, which is incorporated herein by reference; it is

ORDERED, that the revised attachment 1 and attachment 2 to Exhibit 19 submitted by the consumer advocate on September 24, 1987 shall be marked as Exhibit 19A in this proceeding; and it is

FURTHER ORDERED, that Exhibit 35 shall be marked in this proceeding and it shall consist of the PSNH responses to consumer advocate data requests specified below:

PSNH Response to OCA-137 (4 pages)
PSNH Response to OCA-138 (3 pages)
PSNH Response to OCA-139 (4 pages)
PSNH Response to OCA-140 (16 pages)
PSNH Response to OCA-141 (1 page)
PSNH Response to OCA-142 (1 page)
PSNH Response to OCA-143 (1 page)
PSNH Response to OCA-144 (1 page);

and it is

FURTHER ORDERED, that the eight page response to Commissioner Bisson's request, including the cover letter dated September 22, 1987 from Susan B. Kullberg, shall be marked as Exhibit 36; and it is

FURTHER ORDERED, that this Order shall be supplemented with regard to data on common plant as detailed in the foregoing Report; and it is

FURTHER ORDERED, that this commission's response to the court's order of September 2, 1987 (as discussed at page 3 of the

court's order) is not complete until the issuance of that supplemental order.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of October, 1987.

Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

Attested By:

_____

Wynn E. Arnold
Executive Director & Secretary

APPENDIX F

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

SUPPLEMENTAL REPORT REGARDING FINDINGS PURSUANT TO SEPTEMBER 2, 1987 SUPREME COURT ORDER

Pursuant to the directions of the Commission, the parties to this proceeding convened a conference at 9:00 a.m. on October 16, 1987 to determine if agreement could be reached to quantify the amount of common plant investment that should be utilized to complete the table at page 24 of the Report Regarding Findings Pursuant to September 2, 1987 Supreme Court Order and Sixth Supplemental Order No. 18,873 (October 14, 1987) [hereinafter cited as October 14 Order]. At approximately 10:30 a.m. on that day, the parties informed the commission that the conference did not produce an agreement. Thus, the commission held a hearing to take evidence on this matter of common plant investment on October 22, 1987.

Based upon the evidence heard at that hearing the commission makes the following findings to supplement its October 14 Order. Evidence relevant to developing the required investment amounts appears in exhibits 36, 47, 48 and late filed exhibit 56,[1] as well as the oral testimony provided at the hearing on October 22. Column 2 of the table on page 24 of the October 14 Order, and column 2 of exhibit 36, page 2 (the page after the cover letter) include investment in Unit I along with 100% of common plant, the termination yard, and the education center. Pursuant to the October 14 Order, the commission desires to develop a final Unit I investment number that includes 100% of the termination yard and education center, but 50% of common plant. Exhibits 47, 48 and 56 contain reasonable numbers on common plant investment except that these exhibits include investment in

1 PSNH filed exhibit 56 on October 23, 1987 pursuant to direction of the commission during the October 22, 1987 hearing.

the termination yard and education center. Thus, the commission must adjust the numbers in exhibits 47, 48 and 56 to exclude the investment in the termination yard and education center.

In exhibit 36, page 2, columns 3 and 4 reflect investment in the education center and termination yard. However, those investment numbers include amounts recorded as common plant plus amounts of indirect costs associated with the termination yard and education center. Based on the testimony at the hearing, the commission finds it reasonable to assume that approximately 1/3 of the amounts listed in exhibit 36, page 2, columns 3 and 4 for the termination yard and education center are indirect costs.

Based on the foregoing, the commission shall develop final numbers for estimates of PSNH investment in Unit I for purposes of replying to the supreme court order as follows. First, the commission shall reduce the education center and termination yard figures in exhibit 36, page 2, columns 3 and 4, by one-third to remove indirect costs. These adjusted numbers reasonably approximate the common plant costs in the education center and termination yard. The commission subtracts these adjusted numbers from the common plant figures in exhibits 47, 48 and 56. The resulting numbers are the common plant numbers appropriate to fit into the formula and the table on page 24 of the commission's October 14 Order. The table below shows the results from completing the formula in the table on page 24 of the October 14 Order and constitutes the commission's findings on investment in Unit I. This report and order completes the findings with regard to the September 2, 1987 order in supreme court case no. 87-311.

PSNH INVESTMENT IN UNIT 1

Date	*PSNH Investment in Unit 1*
04/30/77	65,003,098
05/31/78	152,376,338
04/30/79	214,210,548
12/31/79	287,920,316
12/31/80	408,505,079
12/31/81	445,555,835
12/31/82	607,373,109
12/31/83	854,348,392
12/31/84	1,084,696,629
12/31/85	1,347,895,265
12/31/86	1,624,262,219
12/31/87	1,766,468,881

Our order will issue accordingly.

Concurring:

November 2, 1987

Vincent J. Iacopino
Chairman

Bruce B. Ellsworth
Commissioner

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

CONCURRING OPINION OF COMMISSIONER LINDA G. BISSON

I concur with the foregoing decision of the majority but, consistent with our October 14 Order, add the following clarification. For reasons stated in my concurring opinion of October 14, the schedule below adjusts investment to delete the education center and the termination yard. In my opinion, column 5 (the column to the far right) of the schedule below most accurately reflects the PSNH investment in Unit I.

		Adjustment for Assets Subsequently Placed in Rate Base		
Date	*Investment*	*Ed Ctr.*	*Term Yard*	*Investment*
04/30/77	65,003,098	136,004	213,333	64,653,761
05/31/78	152,376,338	890,433	956,318	150,529,587
04/30/79	214,210,548	1,063,924	659,723	212,486,901
12/31/70	287,920,316	1,124,722	4,857,386	281,938,208
12/31/80	408,505,079	1,146,217	7,252,975	400,105,887
12/31/81	445,555,835	1,148,573	7,252,975	437,154,287
12/31/82	607,373,109	1,161,072	6,995,909	599,216,128
12/31/83	854,348,392	884,370	6,995,909	846,468,113
12/31/84	1,084,696,629	884,370	6,995,909	1,076,816,350
12/31/85	1,347,895,265	884,370	6,995,909	1,340,014,986
12/31/86	1,624,262,219	884,370	6,995,909	1,616,381,940
07/31/87	1,766,468,881	884,370	6,995,909	1,758,588,602

LINDA G. BISSON

Linda G. Bisson
Commissioner

November 2, 1987

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

NINTH SUPPLEMENTAL ORDER NO. 18,890

Based upon the foregoing SUPPLEMENTAL REPORT REGARDING FINDINGS PURSUANT TO SEPTEMBER 2, 1987, SUPREME COURT ORDER, which is incorporated herein by reference; it is

ORDERED, that the foregoing report, along with the October 14 Order, constitutes the commission's findings pursuant to the supreme court order of September 2, 1987 in its case no. 87-311.

By order of the Public Utilities Commission of New Hampshire this second day of November, 1987.

VINCENT J. IACOPINO	BRUCE B. ELLSWORTH	LINDA G. BISSON
Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

Attested By:

WYNN E. ARNOLD

Wynn E. Arnold
Executive Director & Secretary

APPENDIX G

DR 87-151

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

TENTH SUPPLEMENTAL ORDER NO. 18,901

WHEREAS, Public Service Company of New Hampshire filed for emergency rates in August of 1987; and

WHEREAS, the New Hampshire Public Utilities Commission issued on August 11, 1987 an Interlocutory Transfer Without Ruling which contained two questions; and

WHEREAS, subsequent to said date the supreme court remanded the matter to the New Hampshire Public Utilities Commission to make certain findings a fact; and

WHEREAS, the commission held hearings and by Order Nos. 18,873 and 18,890 respond to the request made by the supreme court; and

WHEREAS, subsequent to said orders the commission has substantially concluded its hearings regarding the merits of the emergency rate request; and

WHEREAS, in reviewing the record the commission has determined that there exists a question of law pertaining to the statutory interpretation of RSA 378:9 as it relates to RSA 378:30-a; and

WHEREAS, the commission determines that it is in the public interest to resolve the question of statutory interpretation to determine whether or not the commission has the statutory authority to grant emergency rate relief using standards other than the traditional ratemaking standards and to further determine whether or not the emergency rates can be based on a strictly cash flow need; it is therefore

ORDERED, that pursuant to RSA 365:20 that the following question of law be reserved, certified and transferred to the

New Hampshire Supreme Court with the further request that said question be joined with the questions docketed by the court as 87-311 and set forth in the Interlocutory Transfer Statement issued by the commission with Order No. 18,788 (August 11, 1987):

> 3. Does the proper interpretation of RSA 378:9, which provides that the commission may "temporarily . . . alter, amend or suspend any existing rate, fare, charge, price, classification or rule or regulation relating thereto . . ." when it finds that an emergency exists, allow the commission, upon the finding that an emergency exists, to depart from traditional ratemaking methods to establish temporarily rates which will allow a utility to meet cash flow requirements, notwithstanding the provisions of RSA 378:30-a?

By order of the Public Utilities Commission of New Hampshire this fifth day of November, 1987.

VINCENT J. IACOPINO	BRUCE B. ELLSWORTH	LINDA G. BISSON
Vincent J. Iacopino	Bruce B. Ellsworth	Linda G. Bisson
Chairman	Commissioner	Commissioner

Attested By:

WYNN E. ARNOLD

Wynn E. Arnold
Executive Director & Secretary

APPENDIX H

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 4, 1987 made the following order:

The public utilities commission (PUC) having filed its report and supplemental report making findings of basic facts in accordance with this Court's order of September 2, 1987, and the Court having considered the PUC's interlocutory transfer without ruling and the parties responsive pleadings, the interlocutory transfer is accepted and it is further ordered as follows:

1. The parties may on or before November 10, 1987, file amendments to their previously filed pleadings.

2. The brief previously filed by PSNH is docketed; PSNH may on or before November 16, 1987, file an amended brief; and any party supporting the position of PSNH shall file its brief on or before November 16, 1987.

3. Briefs of all other parties shall be filed on or before December 10, 1987, and oral argument shall be held on December 15, 1987.

Distribution:

Martin L. Gross
R. Carl Anderson
Margaret H. Nelson
Stephen E. Merrill
Larry M. Smukler
Wynn E. Arnold
Martin C. Rothfelder
Michael W. Holmes
Ralph Littlefield
Dom S. D'Ambruoso

Lt. Col. Vassey, Esq.
Dr. Charles E. Johnson
Gary A. Enders
Jeffrey J. Zellers
Robert C. Hinkley
Michael B. King

Ralph H. Woods,
Clerk

APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 17, 1987 made the following order:

The public utilities commission (PUC) has found it to be reasonably likely that Public Service Company of New Hampshire (PSNH) would need additional revenues from a rate increase in order to meet its cash obligations and that traditional ratemaking methods would not allow such an increase without violating RSA 378:30-a. *See* PUC report regarding findings pursuant to September 2, 1987 supreme court order, dated October 14, 1987, at 13-14. The court concludes, therefore, that it has an adequate basis to consider the third question transmitted by the PUC by tenth supplemental order no. 18,901, dated November 5, 1987, and accepts that question.

The brief of PSNH on the third question and of any party supporting its position on that question shall be filed on or before November 25, 1987, without continuance; the third question may be briefed by all other parties in the brief due on or before December 10, 1987, as provided in this court's order of November 4, 1987 in this case, without continuance; oral argument shall be held on December 15, 1987, at 10:00 a.m., as provided in the order of November 4, 1987.

The Consumer Advocate and the Campaign for Ratepayers' Rights may appear as parties. Each shall be allowed ten minutes of oral argument. Mary Chambers is given leave to file a brief amicus curiae.

PSNH motion for appearance of non-member of the New Hampshire Bar is granted.

The court will not rule prior to oral argument on the various motions for summary disposition. Those filing such motions may repeat the arguments contained therein in their respective

APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-311 Appeal of Public Service Company of New Hampshire the court upon November 17, 1987 made the following order:

The public utilities commission (PUC) has found it to be reasonably likely that Public Service Company of New Hampshire (PSNH) would need additional revenues from a rate increase in order to meet its cash obligations and that traditional ratemaking methods would not allow such an increase without violating RSA 378:30-a. *See* PUC report regarding findings pursuant to September 2, 1987 supreme court order, dated October 14, 1987, at 13-14. The court concludes, therefore, that it has an adequate basis to consider the third question transmitted by the PUC by tenth supplemental order no. 18,901, dated November 5, 1987, and accepts that question.

The brief of PSNH on the third question and of any party supporting its position on that question shall be filed on or before November 25, 1987, without continuance; the third question may be briefed by all other parties in the brief due on or before December 10, 1987, as provided in this court's order of November 4, 1987 in this case, without continuance; oral argument shall be held on December 15, 1987, at 10:00 a.m., as provided in the order of November 4, 1987.

The Consumer Advocate and the Campaign for Ratepayers' Rights may appear as parties. Each shall be allowed ten minutes of oral argument. Mary Chambers is given leave to file a brief amicus curiae.

PSNH motion for appearance of non-member of the New Hampshire Bar is granted.

The court will not rule prior to oral argument on the various motions for summary disposition. Those filing such motions may repeat the arguments contained therein in their respective

briefs. The arguments contained in the motions may not be incorporated by reference since the court will review the briefs prior to oral argument, but will not review the separately filed motions.

Ralph H. Wood,
Clerk

Martin L. Gross
R. Carl Anderson
Margaret H. Nelson
Larry M. Smukler
Wynn E. Arnold (PUC)
Martin C. Rothfelder
Michael W. Holmes
Ralph Littlefield (CAP)
Dom S. D'Ambruoso (BIA)
Lt. Col. Vassey, Esq.
Dr. Charles E. Johnson
Gary A. Enders
Jeffrey J. Zellers
Robert C. Hinkley
Michael B. King
File

APPENDIX J

RE PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Intervenors: Legislative Utility Consumers' Council and Community Action Program.

DR 79-187, 17th Supplemental Order No. 14,012
January 28, 1980

Order denying motions for rehearing of a commission order allowing an electric utility an emergency rate increase.

Revenues, § 10—Allowance for funds used during construction.

The commission adopted a method of treating financing costs whereby allowance for funds used during construction were accumulated, capitalized, and charged to an electric company's construction work in progress account, together with other costs associated with construction; only when the plant became operational was the total labor and materials cost, as well as the accumulated allowance for funds used during construction, included in rate base. [1] p. 48.

Procedure, § 33—Rehearing—Inadequate grounds.

The commission denied a motion for rehearing regarding their order as to an electric company's construction work in progress account because the commission's treatment of the account was in compliance with the method adopted by the legislature. [2] p. 48.

Return, § 4—Rate of return—Commission duty.

The commission by law is bound to provide a utility the opportunity to earn not less than a reasonable return on the cost of property of the utility used and useful in the public service less accrued depreciation. [3] p. 49.

Return, § 6—Rate of return—Amount to be allowed.

In making the finding as to permanent rates, the commission must arrive at an acceptable method of calculating rates; rate of return cannot be artificially set, nor can it be excessive or extortionate. [4] p. 49.

Return, § 35—Rate of return—Market conditions.

A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally. [5] p. 51.

Return, § 7—Calculation of return—Cost rates of equity and debt.

The rule that the cost rates of all equity and debt issues should be included for the purposes of conducting the traditional method of calculating an overall rate of return has been a cornerstone of utility regulation even though the commission does retain its right to use a hypothetical capital structure where just and reasonable considerations dictate such a finding. [6] p. 53.

Return, § 20—Rate of return—Amount to be allowed.

A utility is entitled to a rate of return which is at minimum its cost of capital. [7], p. 53.

Rates, § 354—Water heating surcharge—Transfer from residential to commercial customers.

The commission ordered an electric utility to remove an emergency surcharge from residential controlled water heating rates and transfer the revenue impact to the commercial classification to be recovered on a per kilowatt-hour basis, except for controlled water heating commercial customers, which could continue to have an exemption from any emergency surcharge; the commission's action was necessitated by the President's call for less oil usage and greater conservation during the energy crisis, year-end figures which revealed larger increases in commer-

cial usage, and a contention as to the plight of the low-income consumers and the necessity for them to have an avenue to mitigate the rising costs of energy. [8] p. 54.

BY THE COMMISSION:

Supplemental Order

I. *Procedural History*

The commission issued a report and final Order No. 13,962 on December 26, 1979 (64 NH PUC 458), to be effective as of December 28, 1979. In that report and order, the commission allowed an emergency rate increase of $11,970,591. A legal interpretation was made that any motions for rehearing had to be filed by January 17, 1980. This legal interpretation was made known to all parties as was the commission's decision to render one decision in addressing any and all motions for rehearing. On January 8, 1980, the Legislative Utility Consumers' Council [hereinafter referred to as LUCC] filed a motion for rehearing. This filing was supplemented by a second filing on January 9, 1980.

On January 10, 1980, sixty-five members of the New Hampshire legislature filed a motion for rehearing. On January 16, 1980, the selectmen from Seabrook filed a motion for rehearing. On January 17, 1980, the Community Action Program (hereinafter referred to as CAP) filed a motion for rehearing. Community Action Program and the LUCC are the only full parties to the proceedings to file motions for rehearing.

II. *Standing*

The commission is concerned that the members of the New Hampshire legislature are not parties to the proceeding. Nor, for that matter, are the selectmen from Seabrook. The concerns of both of these groups revolves around the question of whether or not the commission's decision violates RSA 378:30-a. Since this concern is already raised by the motions for rehearing submitted by CAP and LUCC, the motions by these nonparties are

duplicative. Therefore, our response to the CAP and LUCC motions will be a sufficient answer to all motions.

III. *LUCC Motion for Rehearing*

The LUCC cites numerous grounds for rehearing: (1) that RSA 378:30-a precludes the discussion of the costs of construction and, therefore, is irrelevant for the establishment of rates; (2) that the emergency rates should have been denied since Public Service Company of New Hampshire (PSNH) cannot substantiate an increase of 5.5 percent over their current level of revenues; (3) that there is no resulting benefit to the ratepayer when utility profits are allowed to become astronomical; (4) the granting of an enhanced rate of return for the purpose of creating cash flow is an unconstitutional deprivation of the ratepayers' property without adequate compensation; (5) that the commission committed an error of law in finding that an emergency exists when the company is earning a rate of return, which is in excess of that allowed by this commission in DR 77-45; (6) that the commission committed error in its description of Professor Williamson's testimony; (7) that the commission failed in its statutory duty to follow RSA 363:17-b; (8) that the commission committed error as to its discussion of debt and preferred stock costs; (9) that the commission took improper notice of stating what would have been the case had not RSA 378:30-a been passed and that the $18 million increase is comparable to putting $180 million of CWIP in the rate base; (10) that the commission committed error on pp. 9 and 10 of its report where it made observations concerning the risk factors affecting PSNH now as compared to the situation in DR 77-49; (11) that the LUCC has been denied an opportunity to meet in appropriate fashion the factors upon which the commission relied; (12) that PSNH failed to inform either the parties or the commission as to the possibility of increased available funds; (13) that the commission committed error because it based its report and order on rates and charges that reflect construction; (14) that the commission committed error by ruling that RSA 378:30-a was not designed in consideration of construction from all elements of rate making; (15) that the commission

committed error by not disclosing Commissioner Stevenson's opinion that RSA 378:30-a is unconstitutional.

IV. *CAP's Motion for Rehearing*

Community Action Program asserts the following as grounds for rehearing: (1) that the commission's Order No. 13,962 is unreasonable, in that low-income ratepayers are being required to pay emergency rates when PSNH is not being required to take emergency measures to alleviate the financial crisis; (2) that the commission Order No. 13,962 is unreasonable because even though an emergency may exist, the crisis cannot be cured by the rates requested and the regulatory steps proposed by PSNH; (3) that the commission is basing rates upon the cost of financing the Seabrook construction project and, therefore, its action is unlawful; and (4) that the rates are unjust and unreasonable.

V. *Commission Analysis*

A. *Financing Costs*

Any public utilities commission has in essence two ways of treating financing costs. The first method is to include CWIP in rate base. The account, construction work in progress (CWIP), is included in rate base and thereafter earns a return, which represents the financing costs of plant under construction. The rate-making effect of such treatment is to increase rate base and thereby increase the rates to present consumers. *Because CWIP is added to rate base, the financing costs associated with construction are recovered currently.* (Emphasis supplied.) Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—, 31 PUR4th 333, 402 A.2d 626.

The second method is to exclude CWIP from rate base. The financing costs incurred during construction, AFUDC (allowance for funds used during construction), are accumulated, capitalized, and charged to the utility's CWIP account, together with other costs associated with construction. When the plant begins to actually generate electricity (in the case of an electric utility's generating plant) the rate base *then and only then* includes the total labor and materials costs, as well as the

accumulated AFUDC (financing costs). At this time of actual generation, the company earns a rate of return on the AFUDC and recoups the same by depreciation.

[1, 2] In DR 77-49, the commission adopted the first method, which resulted in present consumers paying the financing costs for CWIP currently. The legislature, by the passage of RSA 378:30-a, foreclosed the commission from basing rates and charges after May 7, 1979, on this method. Consequently, the commission after notice and hearing issued its report and order in DR 79-107. One of the effects of our order in DR 79-107 was to revert to the second method as to treatment of financing costs, AFUDC. When the generating units presently listed in PSNH's construction work in progress account actually begin to generate electricity, that is when this commission will pass on to consumers the costs of financing, labor, and materials for these plants. Public Service Company of New Hampshire has returned to its prior method (before DR 77-49) of accumulating and capitalizing financing costs, which will be passed on to consumers when the plants begin to generate electricity. There is simply nothing in our order that allows the financing costs associated with CWIP to be passed on to present consumers. Rather, the commission in Re Public Service Co. of New Hampshire (1979) 64 NH PUC 124; (1979) 64 NH PUC 312, has specifically removed all costs from construction out of rate base. Therefore, since the commission is not passing on to present consumers the cost of financing, these aspects of the motions for rehearing are rejected.

B. *Enhanced Rate of Return*

The LUCC and the members of the legislature who filed a motion for rehearing have alleged that the commission has allowed an enhanced rate of return. Counsel for the LUCC had originally asserted that this phrase appeared somewhere in PSNH's testimony. Later the counsel for the LUCC admitted that his office was unable to find any statement as to enhanced rate of return in the company's request, testimony, or exhibits. However, the allegation still remains supplemented by the as-

sertion that the commission is allowing astronomic profits. (See transcript 5-176, 6-48.)

[3] The commission has not allowed an enhanced rate of return. Seemingly, this concept is based on some misconception that the commission has found a level of return and just added some enhancing factor. This argument is simply false. The commission by law is bound to provide a utility the opportunity to earn not less than a reasonable return on the cost of property of the utility used and useful in the public service less accrued depreciation. RSA 378:27 28, 7.

[4] These statutes require the commission to allow an overall rate of return that is at a minimum the cost of capital. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 353, 361, 78 PUR NS 67, 64 A2d 9. The New Hampshire supreme court has also found that the commission must disclose the method it uses to arrive at a reasonable rate of return as to permanent rates. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 353, 358, 359, 78 PUR NS 67, 64 A2d 9. In addition, the commission must find a rate of return that is within the zone of reasonableness that is neither too low to be confiscatory, nor too high to be excessive and extortionate. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 233, 44 PUR3d 498, 183 A2d 237; Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—, 31 PUR4th 333, 402 A2d 626. The commission, therefore, must in making its finding as to permanent rates arrive at an acceptable method of calculating rate of return; and rate of return cannot be artificially set, nor can it be excessive or extortionate.

In determining a proper rate of return for any regulated utility, this commission breaks out the total capitalization of the company into its debt and equity components. These components are weighted and costed and then through mathematics used to arrive at the overall cost of capital. When the commission based its emergency rates finding on the fact that a higher rate of return was reasonable (as compared to DR 77-49) it was merely reflecting changes known in this proceeding and other proceedings involving this company and, for that matter, the

intervenors in this proceeding. (See Re Public Service Co. of New Hampshire [1979] 64 NH PUC 321; [1979] 64 NH PUC 324.)

For example, the cost rate of short-term debt is tied to the prime interest rate. Both Mr. Harrison and Mr. Williamson were aware of the prime interest rate, the recent dramatic rise in this rate since the last case, and the fact that the company's short-term debt is directly tied to the prime rate. (Transcript—December 13, 1979, pp. 71-73, Exh D, p. 1.)

As to the commission's eventual finding of a proper return on common equity, this commission is required to follow the general tests set forth in Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, PUR1923D 11, 67 L Ed 1176, 43 S Ct 675; Federal Power Commission v Hope Nat. Gas Co. (1944) 320 US 591, 51 PUR NS 193, 88 L Ed 333, 64 S Ct 281. The relevant sections are as follows:

"A public utility is entitled to such rates as will 'permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties'; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally." (262 US 679, 692, 693 PUR1923D at pp. 20, 21.)

"The rate-making process under the [Natural Gas] Act—i.e., the fixing of 'just and reasonable' rates—involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Company case that 'regulation does not

insure that the business shall produce net revenues.' 815 US at p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view, it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . "By that standard the return to the equity owner should 'be commensurate with returns on investments in other enterprises having corresponding risks.' That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. . . ." (320 US 591, 603, 51 PUR NS at pp. 200, 201.)

In determining a final and permanent return on common equity, the commission will have the advantage of numerous witnesses, who will apply the aforementioned criteria of Hope and Bluefield to PSNH's present situation. However, when the commission is forced to make an examination based on RSA 378:9 and/or 27, the commission has not been afforded the option of a thorough review. Rather, that responsibility relates to the commission's decision on any permanent finding. New England Teleph. & Teleg. Co. v New Hampshire (1948) 95 NH 58, 62, 75 PUR NS 370, 57 A2d 267. New England Teleph. & Teleg. Co. v New Hampshire (1949) 95 NH 515, 518, 82 PUR NS 296, 68 A2d 114. If the commission's findings are too low or too high, when actual testimony is received relating to the Hope and Bluefield criteria, the legislature has provided avenues of address in the form of RSA 378:29 and 30.

The allegation that the commission has merely substituted return on equity for CWIP also is unfounded. The company's expense levels were last adopted for rate making at April, 1976, to April, 1977, levels. The commission has removed CWIP from rate base and has thereby reduced rate base below that used in the last proceeding The final determination as to a proper overall return, together with the increased expense levels and reduced rate base, will determine the direction of future rates. The commission will measure the various traditional cost rates

and determine a final overall return. See Priest, Book 1, "*Principles of Public Utility Regulation*," p. 209.

Neither the expenses of this company nor the rate base will reflect any financing, labor, or material costs associated with the account labeled "construction work in progress."

Since the commission will be making a finding as to a proper rate of return in the permanent rate case based on the application of legal criteria to testimony and exhibits, and where, further, both the consumers (RSA 378:30) and the investors (RSA 378:29) are protected during the interim, and, finally, where the expression of enhanced rate of return has neither any factual record, nor other support, the commission does not find any error in its decision.

C. *Astronomical Profits and Enhanced Return for Cash Flow*

The commission has already stated that it is in the process of conducting its full investigation into a proper rate level. The commission is bound by statute RSA 378:7 and New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 233, 44 PUR3d 498, 183 A2d 237, not to allow either an excessive, extortionate, or confiscatory return. Our determination reflects this standard. In addition, the standard that a utility must be allowed an opportunity to earn a reasonable return so as to attract capital is reflected in our decision in this emergency proceeding and will also be reflected in our decision as to permanent rates.

Since the commission has found no factual basis for the assertion that the commission has made a finding of an enhanced rate of return, the commission finds no merit to the LUCC's contention.

D. *Return in Excess of That Allowed in DR 77-49*

[5] Just and reasonable rates are the touchstone for the establishment of rates in New Hampshire. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 232, 44 PUR3d 498, 183 A2d 237, 240. A rate of return may be reasonable at one time and become too high or too low by changes af-

fecting opportunities for investment, the money market, and business conditions generally. Bluefield Water Works & Improv. Co. v West Virginia Pub. Service Commission, 262 US 679, 692, 693, PUR1923D 11, 67 L Ed 1176, 43 S Ct 675.

The cost rates of new issues of debt and preferred stock have been higher than the average found in DR 77-49. The testimony of Mr. Williamson (transcript—December 13th at p. 105) and Mr. Meyer, indicate a higher return on common equity. Together they support a finding that the overall rate of return, to be at minimum the cost of capital, New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d 498, 183 A2d 237 is higher now than in DR 77-49. Whether the commission has allowed a return unreasonably high or low will be the subject of the permanent hearings. Further changes in the economy, the prime rate, the money market, and business conditions may change the overall result. At this time, the commission rejects the LUCC's contention of error.

E. *Commission's Analysis of Professor Williamson*

Professor Williamson testified that he believed Public Service Company to be riskier than what it was at the time of the most recent rate increase (December 13th transcript, pp. 109, 105). Professor Williamson was also asked if the commission chose to base rates only on cost of service, was the range between 4.2 and 6.2 per cent increase? Professor Williamson indicated at that point in time that it was his best range (December 13th transcript, p. 90). The commission does not find any substance to the contention that it misstated Professor Williamson's testimony.

F. *Assertion that PSNH Failed to Inform the Commission and Parties that Additional Lines of Credit Were Available*

Counsel for the LUCC alleged in the LUCC's motion for rehearing that PSNH had failed to inform the commission and the LUCC as to the possibility of increased lines of credit from banks previously not involved with PSNH. Counsel for PSNH by letter to the commission has indicated various references in

the record to this possibility. (Public Service Company of New Hampshire Exh. E, at p. 4, transcript—pp. 2-279.) (The commission would also note staff Exh 5, staff Exh 6—p. 5.)

On January 23, 1980, counsel for the LUCC sent a letter to the commission, which indicated he agreed with the company's position. However, while no longer finding the company guilty of hindering the possibility of additional credit, the LUCC now turns its focus to the commission, the allegation being that the commission has failed to address with sufficient detail the possibility of this additional line of credit.

However, besides being a faulty contention as to error, the opinions of the commission indicated its awareness of the possibility of additional extensions of credit. (See line 1 of p. 9.) Furthermore, the entire opinion, which focused on the need to have a level of rates that attracted capital, is satisfactory proof that the commission desired to achieve additional areas of access to the capital markets. Therefore, the commission rejects the LUCC's contention as to this aspect of its motion for rehearing.

G. *The Commission's Analysis on Pages 9 and 10 of the Original Opinion*

The allegations made by the LUCC are that the findings on pp. 9 and 10 are without support on the record. Consequently, the LUCC argues that the LUCC has been deprived of an opportunity to address the factors relied upon by the commission. The LUCC cites the commission's attention to Legislative Utility Consumers' Council v Public Service Co. of New Hampshire (1979) 119 NH—31 PUR4th 333, 402 A2d 626. To begin with, even if there was not factual support on the record, the LUCC has the opportunity to meet these contentions in the permanent rate increase hearings. However, there is support in the record for the commission's findings.

The increased risk associated with the construction of nuclear plants has support in numerous places in the record. (Williamson, transcript, p. 110, middle p. 111—December 13, 1979; Harty Exh E, pp. 1, 3; also Meyer prefiled testimony.)

The finding as to the steady decline of the market and the chilling effect on stocks of utilities has support also within the

record. Mr. Meyer made repeated references to the Volker Saturday night massacre (transcript—December 12, p. 22, for example) and its effect on the electric utility market. Mr. Meyer found today's marketplace to be as difficult as any period since the 1974-75 crisis period. (Transcript—December 12th, p. 263.) The marketplace for PSNH's common stock, as well as for all electric utilities, has been on a downward slide (transcript—December 12th, p. 222).

The lack of progress on the divestiture has had an adverse impact on investors' confidence (transcript—December 12th, p. 272; Harrison Exh D, p.1). An adverse impact that unfortunately will be "enhanced" by actions taken after the commission rendered its decision.

Finally, the partial offset to the new increased risks of nuclear—namely, the recent increases in the price of oil—was recognized by the LUCC's own witness. (Transcript—December 13th, p. 110.)

Consequently, the commission has adequate support for its findings and will, therefore, reject this aspect of the LUCC's finding.

H. *Discussion of the Effects of RSA 378:30-a*

The commission had representations from the LUCC, CAP, as well as numerous members of the public, that the emergency rate increase was a variation of CWIP and against RSA 378:30-a. The commission had the issue placed before it, and due to RSA 373:17-b had to address the issue.

The LUCC's contention that the $18 million increase is comparable to putting $180 million in rate base is a perfect example of the assertions. When the hearings resumed as to the permanent rate determination, the LUCC again put forward this theory only to learn that they had forgotten to tax effect their result. Therefore, if one assumes: (1) that expense levels were the same as 1976-77; (2) that the rate of return was unchanged; (3) that there were no new additions to rate base of completed plant since 1977; and (4) there was no increased depreciation, the LUCC learned that the placement of $180 million in rate base would be an increase of $30 million, not $18 million. Fur-

thermore, all those other elements have not remained stable, and the present account for construction work in progress is closer to $500 million.

I. *Other LUCC Contentions*

The LUCC's other arguments revolve around its disagreement with the commission's interpretation of RSA 378:30-a. The commission finds that this new statute prohibits this commission from including CWIP in the rate base. The commission also finds that all financing costs, AFUDC, will be accumulated and capitalized until the units in the account, construction work in progress, are actually generating electricity. When this time comes, only then will the financing, labor, and material costs of these units be passed on to the consumer.

[6] The commission does find that the cost rates of all equity and debt issues (external capital) should be included for the purposes of conducting the traditional method of calculating an overall rate of return. This standard rule, which has been a cornerstone of utility regulation for decades, has not been altered by the passage of RSA 378:30-a. (The commission does retain its right to use a hypothetical capital structure where just and reasonable considerations dictate such a finding.) New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d, 498, 183 A2d 237.

[7] The commission rejects, as it has repeatedly, the argument that RSA 378:30-a requires this commission to have evidentiary records void of any mention of a utility's construction program. Furthermore, this commission does not find any conflict with its interpretation of RSA 378:30-a, and the standard that a utility is entitled to a rate of return, which is at minimum its cost of capital. New England Teleph. & Teleg. Co. v New Hampshire (1962) 104 NH 229, 44 PUR3d 498, 183 A2d 237.

As to Commissioner Stevenson's observations, it is clear that RSA 363:17-b does not require each commissioner to disclose each element of his or her decision process in arriving at his or her respective conclusion. Besides, since Commissioner Stevenson has left the commission, the issue is moot. The LUCC's other grounds for rehearing are denied.

J. CAP's Contentions

The commission has addressed many of CAP's contentions in responding to the LUCC's contentions. Community Action Program offers nothing new to its arguments and, therefore, the commission does not find merit to its motion for rehearing.

However, the contention that the commission must address not only the short-term considerations, but also the long term, is a valid point. The proper forum for consideration of the avenues open to the commission on both a short-term and a long-term basis are proper subjects for the hearings on permanent rates. Until that time, the commissions must deny CAP's motion. New England Teleph. & Teleg. Co. v New Hampshire (1948) 95 NH 58, 62, 75 PUR NS 370, 57 A2d 267.

[8] In addition, the commission finds that CAP's concern as to low-income users to be valid at least in part. The commission is attempting to encourage conservation and to the extent that low income and low and wise usage are comparable, the following should assist. Public Service Company of New Hampshire, at its earliest convenience during the month of February, 1980, will remove the emergency surcharge from residential controlled (off-peak) water heating rates and transfer that revenue impact to the commercial classification. This revenue will then be recovered from commercial customers on a per kwh basis, except for controlled water heating commercial customers, which will continue to have an exemption from any emergency surcharge. This action is necessitated by three factors: (1) the President's call for less oil usage and greater conservation during this moment of crisis; (2) year-end usage figures, which reveal larger increases in commercial usage than previously thought; (3) CAP's contention as to the plight of the low-income consumer and the necessity for these consumers to at least have an avenue to mitigate the rising costs of energy.

Consequently, the motions for rehearing are denied and Public Service Company is instructed to alter its rate structure pursuant to this order.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of January, 1980.

APPENDIX K

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 87-311

PETITION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

NOTICE OF APPEAL

Public Service Company of New Hampshire, petitioner, hereby appeals to the Supreme Court of the United States from the Decision of the New Hampshire Supreme Court dated January 26, 1988. Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Public Service Company
of New Hampshire
By Sulloway Hollis & Soden

By _____
Martin L. Gross
9 Capitol Street
Concord, NH 03302-1256

March 25, 1988

CERTIFICATE OF SERVICE

I certify that I have this day mailed a copy of the within Notice of Appeal to Larry M. Smukler, Esquire, Assistant Attorney General, Michael W. Holmes, Esquire, Consumer Advocate and Robert C. Hinkley, Esquire, counsel of record for active parties.

March 25, 1988

_____
Martin L. Gross

Supreme Court, U.S.
FILED
APR 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1613

In The
Supreme Court of the United States
October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

v.

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION OF APPELLEE STATE OF NEW HAMPSHIRE TO DISMISS [OR AFFIRM]

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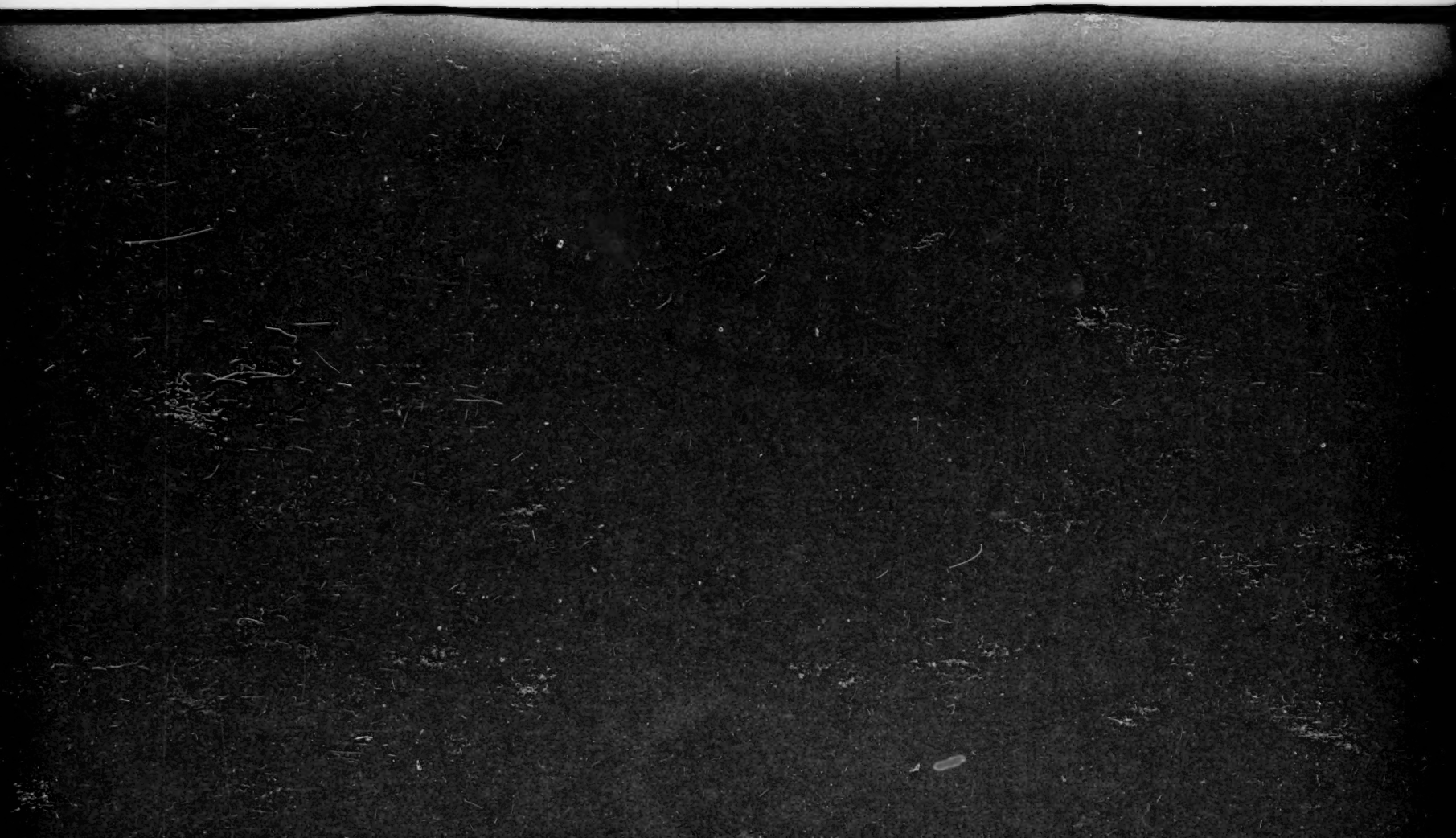

QUESTION PRESENTED

Whether the Supreme Court of New Hampshire correctly held that New Hampshire Rev. Stat. Ann. § 378:30-a (1984) may be applied to a financially distressed utility in a manner consistent with U.S. CONST. amends. V and XIV given that (1) the statute reflected a rational legislative balancing of ratepayer and investor interests, and (2) the New Hampshire Public Utilities Commission consistently applied the statute to provide the utility's investors with just compensation?

PARTIES BELOW

The petitioner below was Public Service Company of New Hampshire (PSNH or Company). The State of New Hampshire (State) was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights (CRR) were intervenors below.

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No. 87-1613

In The
Supreme Court of the United States
October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

v.

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION OF APPELLEE STATE OF NEW HAMPSHIRE TO DISMISS [OR AFFIRM]

The appellee State of New Hampshire moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Hampshire on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATE STATUTE INVOLVED

N.H. Rev. Stat. Ann. § 378:30-a (1984):

Public Utility Rate Base; Exclusions. Public utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

———o———

COUNTERSTATEMENT OF THE CASE

In the early 1970's, PSNH management staked the Company's future on management's ability to construct an electric generating facility (Seabrook) in a timely and cost-effective manner.[1] On January 28, 1988, PSNH management, having failed in its attempt, filed for protection from the Company's creditors under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.*

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[1]PSNH management filed an application for a certificate of site and facility to construct two 1150 megawatt nuclear generating units (Seabrook Unit 1 and Seabrook Unit 2) at Seabrook, New Hampshire on February 1, 1972. *Re PSNH,* 59 N.H.P.U.C. 127, 128 (1974). That certificate was granted on January 29, 1974. *Id; see also* N.H. Rev. Stat. Ann. §§ 162-F:1 *et seq.*

That the undertaking put the Company on the line *ab initio* is clear. In 1974, when the certificate of site and facility was granted, the estimated cost of the completed project was $1.175 billion. *See, e.g., Appeal of Conservation Law Foundation,* 127 N.H. 606, 649, 507 A.2d 652, 682 (1986) (*Appeal of CLF*) (King, C.J. and Batchelder, J. dissenting) (table setting forth the history of Seabrook cost and schedule estimates). At the same time, PSNH had an approved rate base of $258,918,000.[2] *Re PSNH,* 58 N.H.P.U.C. 111, 115 (1973). Since PSNH was a 50% owner of the project, management had undertaken a project that itself was approximately twice the size of the Company.

To finance such a substantial project, a utility could use two alternative mechanisms. Traditionally, debt and equity financing costs are capitalized as Allowance for Funds Used During Construction (AFUDC) and eventually included in the utility's rate base when the plant becomes operational. Under the alternative methodology, the cost of Construction Work In Progress (CWIP) is immediately

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[2]In New Hampshire, utility revenue requirements are established by the use of the traditional formula which, reduced to its essentials, is R=O+(B x r); where R is the utility's revenue requirement, O is the utility's allowed operating expenses, B is the utility's allowed rate base (defined as the original cost of investment in property used and useful in the service of the public less depreciation), and r is the overall rate of return allowed on the utility's rate base. *See, e.g., Appeal of CLF,* 127 N.H. at 633-634, 507 A.2d at 671.

placed in rate base and financing costs are recovered from ratepayers during the construction period.[3]

On April 27, 1977, PSNH, which had been financing its share of the Seabrook project by using the traditional AFUDC method, initiated a rate proceeding to change to the method of including CWIP in rate base. *Re PSNH,* 63 N.H.P.U.C. 127, 128-129, 138 (1978). The request was opposed by the Legislative Utility Consumers' Council (LUCC) which contended, *inter alia,* that the PSNH proposal violated a statutory requirement that rates only allow a return on "the cost of the property of the utility *used and useful* in the public service . . . ." N.H. Rev. Stat. Ann. § 378:27 (1984) (emphasis supplied); *see also* N.H. Rev. Stat. Ann. § 378:28 (1984).

The New Hampshire Public Utilities Commission (PUC) allowed PSNH to include CWIP in rate base. *Re PSNH,* 63 N.H.P.U.C. at 149-150. In so ordering, the PUC recognized that the AFUDC method would generate insufficient internal cash to meet the Company's construction needs and thus PSNH would be required to obtain cash from the financial markets. *Id.* at 145-146. The PUC also construed the "used and useful" statute as one which allowed the PUC a broad range of discretion. *Id.* at 148. Because the PUC believed that the assurance of future availability of electricity was a benefit to present customers, the PUC concluded that the inclusion of CWIP in rate

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[3]Under either the traditional AFUDC method or the alternative CWIP in rate base method, the principal (or the "bricks and mortar" cost of construction) is recovered after the plant becomes operational through depreciation, which is included in rates as an operating expense.

base in that instance was consistent with its reading of the used and useful statute.

The PUC's order was affirmed by the New Hampshire Supreme Court. *LUCC v. PSNH*, 119 N.H. 332, 402 A.2d 626 (1979). The Court construed the "used and useful" statute as allowing the PUC a broad range of discretion to find that a future plant benefits current ratepayers. *Id.*, 119 N.H. at 343, 402 A.2d at 633. Noting that the PUC had established just such a policy, *id.*, 119 N.H. at 344, 402 A.2d at 634, based on sufficient record support, *id.*, 119 N.H. at 344-347, 402 A.2d at 634-636, the Court ruled as follows:

> We hold that the commission's decision represents a reasonable balancing of the interests of present ratepayers, future ratepayers, and the company's investors. The decision is a policy determination that we will not disturb in exercising our appellate function even if we might have come to a different conclusion.

119 N.H. at 347, 402 A.2d at 636. Thus, the Court did not hold that the PUC's decision was constitutionally mandated; rather the Court deferred to a policy determination which fell within the broad range of regulatory discretion delegated to the PUC by the legislature.

Meanwhile, some members of the legislature would have established a different policy. On May 5, 1977, eight days after PSNH asked the PUC to depart from its traditional AFUDC methodology, the New Hampshire House of Representatives adopted language which was later to become N.H. Rev. Stat. Ann. § 378:30-a (RSA 378:30-a), sometimes referred to as the anti-CWIP law. N.H. House Journal, May 5, 1977 at 627. The measure did not become law during that legislative session; although it was passed

by the State House of Representatives, N.H. House Journal, May 5, 1977 at 630, it was indefinitely postponed by the State Senate, N.H. Senate Journal, June 9, 1977 at 2196-2219. However, the bill was reintroduced during the 1979 legislative session. On May 7, 1979, the measure became law. By passing the statute, the legislature divested the PUC of a portion of the discretion previously delegated and itself performed the policy function of balancing the various interests. *Appeal of PSNH*, 125 N.H. 46, 57, 480 A.2d 20, 27 (1984).

The PUC required the Company to remove CWIP from rate base as of the May 7, 1979 effective date of the statute. PSNH concurrently began again to capitalize its debt and equity financing costs as AFUDC. PSNH management also determined that it could no longer finance a 50% ownership share of the Seabrook facility and sought PUC permission to sell down to a 28% share; an ownership percentage which management contended was consistent with the limits of PSNH's financing ability. The PUC granted the PSNH request. *Re PSNH*, 64 N.H.P.U.C. 286 (1979), *aff'd. sub nom., Appeal of LUCC*, 120 N.H. 173, 412 A.2d 738 (1980).[4]

The Company did not sell down to a 28% ownership level, attaining only its present ownership position of

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[4]In affirming the PUC authorization, the New Hampshire Supreme Court expressly held that "a public utility is not bound to supply consumer energy needs beyond its financial capacity to do so." *Appeal of LUCC*, 120 N.H. at 175, 412 A.2d at 739. PSNH neglected to refer to this holding in its Jurisdictional Statement and thus its assertion that New Hampshire utilities are absolutely obligated to serve all comers is a clear misstatement of law. See PSNH Jur. Stat. at 5, 16 (n. 13) and 19. All PSNH arguments which depend on that assertion should accordingly be rejected.

35.6%. Additionally, PSNH experienced continuing delays and cost escalation in its effort to complete the project.[5] As the Company's financial condition deteriorated, the PUC attempted to implement measures that would maintain the Company as a financially viable entity. In this context, the PUC opened an investigation that culminated in its order at *Re PSNH,* 67 N.H.P.U.C. 490, 47 P.U.R. 4th 167 (1982). In that order, the PUC noted that PSNH management had revised its position and now maintained that it could finance a 35% share of the project to completion. *Id.,* 67 N.H.P.U.C. at 499-502, 47 P.U.R. 4th at 175-178. The PUC also noted its concern about PSNH's worsening financial situation, making specific findings with respect to negative cash flow, asset concentration and PSNH's declining bond ratings.[6] *Id.,* 67 N.H.P.U.C. at 513-514, 529-530, 47 P.U.R. 4th at 187-188, 202-203. To address this situation, the PUC directed PSNH not to apply the proceeds of future financings to the construction of Seabrook Unit 2 unless one of the following conditions was met: 1) successful divestiture down to a 28% ownership level; 2) a demonstration of an equivalent response by other utilities to alleviate PSNH's financial condition; or 3) completion

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[5]Because a high proportion of costs are fixed over time, e.g., financing and labor costs, the single largest factor driving the cost of the facility has been management's inability to complete the project in accordance with its proposed schedule.

[6]Declining bond ratings are one measure of the financial risk attributed to PSNH by the investment community. The lower bond ratings had the effect of increasing the cost of PSNH financing. As discussed below, this increased cost was reflected in PSNH's capital structure both for ratemaking purposes and for the purpose of capitalizing AFUDC.

of construction of Seabrook Unit 1. *Id.*, 67 N.H.P.U.C. at 514-515, 47 P.U.R. 4th at 188-189.

PSNH appealed. In *Appeal of PSNH,* 122 N.H. 1062, 454 A.2d 435 (1982), the New Hampshire Supreme Court vacated the PUC order. The Court held that PSNH had a vested right to engage in its construction program and that PUC interference with that program is a taking which requires just compensation. *Id.,* 122 N.H. at 1069-1072, 454 A.2d at 439-441. The Court relied, in part, on the existence of RSA 378:30-a as support for its holding. The Court reasoned that the statute prevents the PUC from allowing the utility to recover from ratepayers the cost of complying with the PUC order. *Id.,* 122 N.H. at 1071-72, 454 A.2d at 440. The Court also noted that the statute rendered prudence determinations premature. The Court stated:

> Because of the so-called anti-CWIP law, RSA 378: 30-a (Supp. 1981), the day will come when a properly noticed hearing will be necessary to determine what costs associated with Seabrook are to be borne by the *consumers* through electric rates and what costs are to be borne by the *stockholders and investors.* Until that time, there can be no prudency determination because ratepayers are not now paying for Seabrook construction work in progress.
>
> Thus, while management in the first instance may be free generally to make its own decisions about its level of investment in new construction [citation omitted], it must bear in mind that as a regulated company not *all* costs may be recovered from the public when the plant is completed.
>
> A vested right to build is not a vested right to have customers pay.

Id., 122 N.H. at 1076, 454 A.2d at 443 (emphasis in the original).[7]

Although PSNH was experiencing financial difficulties, it was able to meet its financing requirements in the ordinary course (albeit at higher costs caused *inter alia* by lower bond ratings) until its financial crisis of 1984. That crisis was triggered by January, 1984 increases in PSNH's estimates of the construction costs and the completion schedules of the Seabrook Units.[8] As a result of those dramatic increases, PSNH was no longer

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[7]The Court's holding reflects the roles of the PUC and PSNH management under the system of rate regulation developed in New Hampshire. In effect, management is to be given all the rope it desires to attain whatever result it can achieve. At that point, the PUC reviews management actions for rate-making purposes. *See also Appeal of CLF, supra.* Although the *Appeal of PSNH* holding was narrowed in *Appeal of Easton,* 125 N.H. 205, 480 A.2d 88 (1984), to provide the PUC with greater substantive authority over utility financings, it is noteworthy that over the construction life of Seabrook, PSNH has never been denied requested financing authority and the PUC has never interfered with management construction decision-making.

[8]PSNH's estimate of the cost of both Seabrook Units jumped from $5.249 billion to $10.1 billion in January of 1984. *Appeal of CLF, supra.* At the same time the commercial operation date for Unit 1 was extended from December of 1984 to April of 1987. Although PSNH had previously estimated that Unit 2 would be complete in July of 1987, the January 1984 estimate did not include any completion date for Unit 2, reflecting the uncertainty in PSNH's ability to complete that Unit. *Id.* Unit 2 was subsequently cancelled. It is noteworthy that the PUC issued an order approximately eight months before the new PSNH estimates (April 29, 1983) which, after a lengthy formal investigation, rejected PSNH's steadfast defense of its $5.2 billion combined (Units 1 and 2) estimate and the process by which the costs and schedules were calculated and regularly reviewed. The PUC found that a more probable combined cost was at least $8 billion. *Re PSNH,* 68 N.H.P.U.C. 257 (1983).

able to finance Seabrook in the ordinary course and construction was suspended.[9] Recognizing that financing would no longer be routine, the Company devised a plan under which the Company's construction and operational requirements would be pre-financed through to the anticipated completion of Seabrook. *See, e.g., Re PSNH,* 70 N.H.P.U.C. 164, 178-185, 66 P.U.R. 4th 349, 362-369 (1985), *aff'd. sub nom., Appeal of CLF, supra.* The PUC issued an order which provided PSNH with the requisite financing authority to implement its plan. *Id.* The Company was successful in marketing the securities required by the plan, thereby pre-financing company operations and construction to the anticipated completion date.[10]

Unfortunately, the Company was unable to achieve commercial operation within the time estimated in its

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[9]The increased cost estimates triggered additional changes. For example, the Seabrook joint owners required an amendment to their agreement, which amendment provided for construction management via an executive committee of the joint owners, rather than by PSNH management. Additionally, the joint owners hired a new engineer to be in overall control of the construction of the project. From that time forward, the joint owners were able to complete the physical construction of Unit 1 within project cost and schedule estimates. The project is not yet in commercial operation, however, because PSNH management has not yet satisfied the United States Nuclear Regulatory Commission that the plant can be safely operated.

[10]Since this was to be PSNH's last pre-completion financing, the estimate of the completion date was critical. The PUC accepted the Company's estimate of the projected schedule to complete the tasks under the control of the Company (*i.e.*, completion of construction to the point of loading fuel), but rejected as too optimistic the Company's estimate for matters outside of its control (*i.e.*, the time interval between fuel load and commercial operation). The financing approval was sufficient under the more pessimistic assumptions found to be reasonable by the PUC. *Re PSNH,* 70 N.H.P.U.C. at 218-223, 66 P.U.R. 4th at 398-402.

1985 financing. In the Spring of 1987, PSNH attempted to market additional short term debt of $150 million with only limited success. As a result, PSNH management concluded that its access to the financial markets was foreclosed and, on August 5, 1987, initiated a request at the PUC for an emergency rate increase of 15% or $70 million in additional revenues.[11] In its emergency rate increase petition, PSNH sought to include 27% of its Seabrook investment in rate base.[12] PSNH requested that the PUC reserve, certify and transfer to the New Hampshire Supreme Court a question of law on whether RSA

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[11]The rate increase was a component of a PSNH three part plan to forestall bankruptcy. PSNH's claim in its Jurisdictional Statement at 9 that the rate component consisted of the $70 million request to the PUC is not completely accurate. PSNH's plan contemplated additional revenues of $75 million. The $5 million not requested through the PUC was to be recovered through a wholesale rate increase approved by the Federal Energy Regulatory Commission (FERC). Despite the existence of the alleged emergency, PSNH never filed such an application with the FERC.

[12]The proposed Seabrook rate base increase was $464 million. This should be contrasted with the rate base of $619.5 million for PSNH's operating assets approved by the PUC on June 29, 1987. *Re PSNH*, 72 N.H.P.U.C. — (June 29, 1987). Although PSNH proferred evidence of prudency to support its proposed rate base addition, it clearly did not contemplate, nor did the PUC undertake, a prudency review. New Hampshire law provides the PUC with a deadline of 18 months to adjudicate rate requests which include rate base additions of the magnitude proposed by PSNH. N.H. Rev. Stat. Ann. § 378:6 (1984). In all financing orders, the PUC has reserved the issue of prudency. *See, e.g., Re PSNH*, 70 N.H.P.U.C. at 246-47, 66 P.U.R. 4th at 424. Thus, to date the PUC has not determined that management was prudent in its overall decision-making (e.g., need for the facility or continued construction given the escalation of cost; sometimes characterized as "macro-prudency") or in its day-to-day construction management (e.g., size of work-force, materials purchasing, or rework; sometimes referred to as "micro-prudency").

378:30-a may be constitutionally applied to PSNH given its current circumstances. The PUC granted the request and, after intervening proceedings to develop a factual record, the New Hampshire Supreme Court accepted the transfer. After briefing and oral argument, the New Hampshire Supreme Court issued the decision which is the subject of the instant appeal. *Petition of PSNH*, — N.H. —, — A.2d — (January 26, 1988) (PSNH Jur. Stat., App. A) (citation to portions of the decision will be to App. A).

In its decision, the New Hampshire Supreme Court noted that it was addressing an "as applied" rather than a facial challenge to the constitutionality of RSA 378:30-a. The Court correctly found that the law reflected rational legislative policymaking and that PSNH investors had, since the passage of the law, been consistently compensated for bearing construction risk. For those reasons, the Court held that the statute could be constitutionally applied to PSNH. This appeal followed.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

I. The Issues Presented Are Not Significant Enough To Warrant Plenary Review.

As PSNH concedes in its Jurisdictional Statement at 4, n.2, it is not contending that RSA 378:30-a is facially unconstitutional; the sole issue on appeal is whether RSA 378:30-a is constitutional as applied.

In examining whether the application of an otherwise valid statute effects a taking, the Court does not apply a set formula; rather, the Court conducts "ad hoc factual inquiries . . . with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Min. & Recl. Ass'n.*, 452 U.S. 264, 295 (1981). Thus, the *ad hoc* factual analysis that the Court would apply in plenary review here would be restricted to the unique factual circumstances confronting PSNH. Such an analysis can have no general applicability. The State's Counterstatement of the Case demonstrates that the PSNH facts are unique in the annals of public utility regulation. No other public utility has created for itself the level of financial exposure experienced by PSNH.[13] Because this appeal turns on particular factual matters which will not have general or recurring applicability, it should be dismissed (or affirmed). *See, e.g., Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (the issue must be "beyond the academic or the episodic"), *United States v.*

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[13]Indeed, in its 1982 Order, the PUC made findings of fact about PSNH's financial condition that are typical of the unique circumstances confronting the Company. Those findings include, *inter alia:* 1) internal cash is negative and will remain so until Seabrook Unit 1 operates; 2) "PSNH's percent of earnings related to AFUDC is substantially above the industry standard"; 3) "CWIP as a percent of net utility plant is substantially above the industry standard"; 4) "[t]he size of the PSNH construction program is extraordinary relative to the size of the Company"; and 5) "PSNH's ownership interest in Seabrook represents the heaviest asset concentration in the industry." *Re PSNH*, 67 N.H.P.U.C. at 529-530; 47 P.U.R. 4th at 202-203, *rev'd. on other grounds, Appeal of PSNH*, 122 N.H. 1062, 454 A.2d 435 (1982).

Johnson, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").[14]

II. The New Hampshire Supreme Court Correctly Decided The Question Presented.

In *Petition of PSNH, supra,* the New Hampshire Supreme Court determined that RSA 378:30-a could be constitutionally applied to PSNH under the standard articulated by this Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) *(Hope)*. The New Hampshire Supreme Court reasoned that *Hope* established the modern standard of constitutional review of utility ratemaking which examines whether the interests of ratepayers and investors have been rationally balanced. Based on its findings that the New Hampshire legislature's balance of the various interests was rational and that the PUC's implementation of the statute provided just compensation, the State Court held that the application of the statute to PSNH was consistent with U.S. CONST. amends. V and XIV.

The New Hampshire Supreme Court's analysis is correct. In *Hope*, this Court rejected the "fair value" constitutional standard previously established in *Smyth v. Ames*, 169 U.S. 466 (1898), a standard that involved the Court in disputes over valuation judgments requiring a circular analysis not grounded in hard accounting data. *See, e.g., Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Com.*, 262 U.S. 276, 290-292, 304 (1923)

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[14]Although *Rice* and *Johnson* were decided in the context of *certiorari*, the importance of the question presented is also pertinent in the context of an appeal. *See, e.g., Wieman v. Updegraff*, 344 U.S. 183, 186 (1952).

(Brandeis and Holmes, J.J., concurring). Instead of a "fair value" standard, *Hope* applied a due process analysis. The Court held that " 'fair value' is the end product of the process of rate-making not the starting point . . . ." *Hope,* 320 U.S. at 601. The appropriate standard of review is to determine whether the total effect of the rate order is just and reasonable. *Id.* at 602. This is done by determining whether the regulator has rationally balanced the interests of the investor and the consumer. *Id.* at 602-603.

Because it was the utility that was challenging the rate order, the *Hope* Court examined whether investor interests were rationally considered. In so doing, the Court articulated several investor interests, including that the utility be given the opportunity to earn sufficient revenue for operating expenses, and debt and equity capital costs. *Id.* at 603. In this context, the Court noted that investors are interested in a return on equity comparable to the return on investments in other enterprises with corresponding risks. *Id.* Additionally, investors are interested in returns that are "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital." *Id.* After ascertaining that the articulated investor interests had been rationally balanced, the Court affirmed the rate order.

Hope required the Court to address a utility contention that rates were unconstitutionally low. Thus, the Court was required to evaluate whether investor interests were rationally considered, but not required to conduct a similar evaluation of consumer interests. This perhaps ex-

plains why the Court did not identify consumer interests at the same level of detail as those of the investor. However, the Court's silence does not mean that there are no consumer interests or that investor interests must always prevail over consumer interests. Nor should the Court's silence be construed as holding that the identified investor interests are of constitutional dimension while consumer interests are not. On a constitutional basis, investor and consumer interests are on an equal footing; the weight to be assigned to each is subject to the rational judgment of the legislature or regulator. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). Moreover, a regulator has the discretion to strike a balance in which consumer interests outweigh those of the investor. *Id.* at 769, 792 ("Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." . . . "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors."); *Market Street R. Co. v. Railroad Com. of Cal.*, 324 U.S. 548 (1945) (consumers are not required to pay rates to satisfy the investor interest in financial integrity when the enterprise cannot be economically operated). It is therefore clear that the *Hope* analysis is essentially a due process standard; if the process used to establish a rate rationally balanced the various interests, the end result is a "just and reasonable" rate.

See also Appeal of CLF, 127 N.H. at 633-640, 507 A.2d at 671-675.[15]

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[15]The New Hampshire Supreme Court's analysis of *Jersey Central Power and Light Company v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) (*Jersey Central*) is entirely consistent with the due process standard established in *Hope*. There, the utility was before the FERC, an agency delegated ratemaking discretion coincident with constitutional limitations. *Hope*, 315 U.S. at 586; *Jersey Central*, 810 F.2d at 1175. The FERC summarily rejected the utility's rate request because the utility asked to include cancelled construction costs in rate base, a practice inconsistent with FERC treatment of the issue in a previous case. *New England Power Co.*, 8 F.E.R.C. (CCH) ¶ 61,054 (July 19, 1979), *aff'd. sub nom., NEPCO Municipal Rate Comm. v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied sub nom., New England Power Co. v. FERC*, 457 U.S. 117 (1982) (*NEPCO*). On appeal, a plurality of the *en banc* United States Court of Appeals for the District of Columbia held that the FERC erred in summarily rejecting the utility's request without first holding a hearing. The plurality grounded its holding on the determination that the FERC's decision did not rest on "adjective law." 810 F.2d at 1170. "The Commission in fact reached and peremptorily decided the utility's claim . . . . In dealing with Jersey Central's rate filings, the Commission applied unclear rules arbitrarily." *Id.* Specifically, the plurality determined that Jersey Central's situation was, on the face of the pleadings, distinguishable from *NEPCO*, 810 F.2d at 1172, and that *NEPCO* was not an "ironclad rule," 810 F.2d at 1183; in fact, the FERC had not established any clear ratemaking policy for the treatment of the cost of abandoned construction, 810 F.2d at 1183-1186, *see also* 810 F.2d at 1188 (Starr, J. concurring). Thus, the FERC's order was not consistent with *Hope* because the FERC had bypassed the process of balancing investor and consumer interests.

On the basis of the foregoing, the New Hampshire Supreme Court correctly determined that the *Jersey Central* holding is inapplicable to PSNH. The narrow *Jersey Central* holding was only that the order of a regulatory agency must be vacated and remanded for a hearing and a statement of reasons where: 1) the legislature has delegated to the agency the discretion to establish a ratemaking policy in a particular area; 2) the agency

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PSNH objects to the New Hampshire process because it was the legislature rather than the PUC which established regulatory policy. Ratemaking, however, is essentially a legislative function. *United States v. Florida East Coast Railway Company*, 410 U.S. 224 (1973); *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565-566, 419 A.2d 1080, 1083 (1980). Clearly, the legislature could decide to exercise itself any regulatory functions previously delegated to the PUC. *See* N.H. CONST. Part II, Art. 2. In exercising these functions, the legislature could constitutionally establish rate policies on an industry-wide basis, even if those policies might produce negative returns in individual instances. *United States v. Florida East Coast Railway Company, supra; Permian Basin Area Rate Cases, supra.* Moreover, it cannot be credibly contended that PSNH is entitled to the same adjudicatory hearing process at the legislature as would be accorded at the PUC. *See, e.g., Atkins v. Parker*, 472 U.S. 115, 130 (1985) (a legislative determination itself provides all the process that is due). It is therefore apparent that it was

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has not exercised its discretion to establish a ratemaking policy in a particular area; 3) the agency nevertheless applies a ratemaking policy in that particular area without giving the parties an opportunity to be heard; and 4) the agency fails to provide reasons to support its action. The *Jersey Central* plurality clearly found that each of the above four deficiencies existed in the FERC proceeding and explicitly held that, if those deficiencies were corrected, the Court would be required to affirm any rational FERC determination. *Jersey Central*, 810 F.2d at 1181-1182 ("When the Commission conducts the requisite balancing of consumer and investor interests, based upon factual findings, that balancing will be judicially reviewable and will be affirmed if supported by substantial evidence. That is the point at which deference to agency expertise will be appropriate and necessary.").

proper for the legislature to adopt regulatory policies by statute.

It is also apparent that the legislative policy established in RSA 378:30-a reflects a rational balance of the relevant interests. A number of policy choices existed; the legislature could have: 1) continued to delegate discretion to the PUC; 2) required the exclusive application of a prudence standard;[16] or 3) provided a narrow definition of the used and useful standard as applied to investment in plant under construction. The legislature chose to define narrowly the used and useful standard so that ratepayers are required to pay only for plant which is literally "used and useful"; *i.e.*, plant which "is actually providing service to consumers." RSA 378:30-a. This policy choice was rational. While after *Hope* the used and useful standard may perhaps no longer be considered to be of constitutional dimension, *see Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938), it still retains vitality as an articulation of the consumer interest in only paying a return on investment

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[16]The prudent investment test is analogous to a negligence standard in determining whether investment should be reflected in rate base. *Appeal of CLF*, 127 N.H. at 637, 507 A.2d at 673-674. If the investment was foreseeably wasteful at the time it was made, it can be excluded from rate base. *Id.* This test has been cited with favor. *See, e.g., Bluefield W.W. & Improv. Co. v. Public Serv. Com.*, 262 U.S. 679, 693 (1923) ("[t]he return should be reasonably sufficient . . . under efficient and economic management . . ."); *Missouri ex rel. S.W. Bell T. Co. v. Public Serv. Com., supra; Washington Gas Light Co. v. Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951). However, the prudent investment test "was not to become the prevailing rule." *Democratic Cent. Com. of D.C. v. Washington M.A.T. Com'n.*, 485 F.2d 786, 801 (D.C. Cir. 1973) (footnote omitted).

devoted to the public use. *Petition of PSNH*, App. A at 16a.

The legislature recognized that a strict used and useful policy might cause utilities cash flow or other financial difficulties, *see, e.g.*, N.H. Senate Journal, April 24, 1979 at 604-615, but made the permissible determination that the consumer interest in the traditional rule outweighs investor interests on this issue. This is supported by the legislative rationale that the policy allocated construction risk to investors, rather than ratepayers. *See, e.g.*, N.H. House Journal, May 5, 1977 at 626-627 (Report of the N.H. Science and Technology Committee).[17] Such risk allocation, while more expensive for consumers, *id.*, serves a public function. The Committee stated:

> The public relies on the expertise of the bond market to oversee the investment decision of public uitilities (sic) and assure that those decisions are made on the basis of sound economics. Unless the public can undertake this oversight function, it should not remove the incentives for lenders to consider carefully their investment by guaranteeing both the principal and the interest of the loan.

Id. PSNH cannot now attack this legislative analysis; it remains reasonable on its face. *Vance v. Bradley*, 440 U.S. 93, 111-112 (1979) ("it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment").

The foregoing demonstrates that the New Hampshire Supreme Court correctly determined that RSA 378:30-a

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[17]As previously noted, the bill introduced in the 1977 session is identical to the language ultimately adopted in the 1979 session as RSA 378:30-a.

was a rational legislative balance which allocated construction risk to investors. The State Court also correctly determined that investors have received just compensation for bearing this risk.

Compensation for risk is the primary factor in determining the rate of return allowed for utility debt and equity instruments included in the utility's capital structure. *Hope,* 320 U.S. at 603; *Bluefield W.W. & Improv. Co. v. Public Service Com.,* 262 U.S. at 691-693.[18] In *Jersey Central,* 810 F.2d at 1208-1209, the dissent addressed the importance of this factor. Judge Mikva noted that it would be unfair to consumers to require them to compensate investors for the risk of loss and then to exact the cost of the loss from consumers in the event that it occurs. In *Jersey Central,* the Court did not have before it a record which would allow it to determine whether investors had already been compensated for risk. *Id.* In contrast, the New Hampshire Supreme Court had a record on which it could determine that the just and reasonable rates established by the PUC since the effective date of the anti-CWIP law compensated investors for the construction

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[18]In this context, the regulatory compact discussed by PSNH in its Jurisdictional Statement at 13-14 provides that, while investors may not be entitled to the benefits of the "peaks" of windfall profits, they will also be insulated from the "valleys" of losses by the entitlement to just and reasonable rates for their monopoly franchise. This compact affects the risk of investment and, thus, the rate of return. However, the return also reflects the fact that while investors may be shielded from some risks, they may not be shielded from others. *See, e.g., Market Street R. Co. v. Railroad Com. of Cal., supra* (market risk). The compensation for the type of risk from which investors are not shielded is included in the overall rate of return established by the regulatory agency.

risk of Seabrook. Such compensation occurred both as a matter of law and as a matter of fact.

As a matter of law, PUC findings that the rates established in its orders are just and reasonable are final unless and until they are vacated by an appellate court or modified by the PUC. N.H. Rev. Stat. Ann. § 365:25 (1984). PSNH is therefore foreclosed from contending at this late date that such final adjudications (including establishment of rates of return) resulted in rates that were not just and reasonable. *Appeal of White Mountains Educ. Ass'n.*, 125 N.H. 771, 486 A.2d 283 (1984) (doctrine of *res judicata* applies to administrative proceedings).

As a matter of fact, the PUC has historically allowed investors to recover for risk. In *Re PSNH,* 64 N.H.P.U.C. 295, 306 (1979), the PUC explicitly recognized that the anti-CWIP law made PSNH riskier and that investors may have to be compensated for such increased risk. In *Re PSNH,* 65 N.H.P.U.C. 45 (1980) (PSNH Jur. Stat., App. J), the PUC considered whether it must exclude construction financing securities from PSNH's capital structure and exclude construction risk from the cost of PSNH's equity. The PUC rejected the contention that the anti-CWIP law requires such exclusion and concluded that it was appropriate to establish an overall rate of return based on its review of all the factors, including construction risk, that are inherent in such an evaluation. 65 N.H.P.U.C. at 48-51, 53-54, PSNH Jur. Stat. App. J at 84a-88a, 92a.[19] The PUC adhered to this reasoning in *Re*

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[19]PSNH challenged the New Hampshire Supreme Court's finding that this regulatory decision approved an enhanced rate

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PSNH, 65 N.H.P.U.C. 251, 275-276 (1980). In *Re PSNH*, 69 N.H.P.U.C. 67, 57 P.U.R. 4th 563 (1984), the PUC had before it a record which quantified the effect on base rates of including Seabrook financing instruments in the capital structure. The PUC found that the inclusion of such instruments increased PSNH's revenue requirement by $25 million. 69 N.H.P.U.C. at 83-84, 57 P.U.R. 4th at 579. The inclusion of this revenue requirement was challenged by the Consumer Advocate and the CRR. The PUC concluded "that RSA 378:30-a does not act as a barrier to recovery of Seabrook related costs as a part of a utility's rate of return." 69 N.H.P.U.C. at 85, 57 P.U.R. 4th at 581. The PUC thus included the cost of Seabrook financing instruments in its overall rate of return calculation, thereby increasing the Company's rates by $25 million.

In the only rate proceeding to take place since PSNH's 1984 financial crisis (with its concomitant effect of lack of access to financial markets) the PUC continued to recognize that the cost of capital should include compensation to investors for construction risk. *Re PSNH*, 72 N.H.P.U.C. — (June 29, 1987) (App. 1). With respect to debt, the PUC allowed PSNH to include its high cost debt in-

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of return as a "miscitation." PSNH Jur. Stat. at 20. While it is correct that the PUC found that the rate of return was not "enhanced" in the sense that "the commission has found a level of return and just added some enhancing factor," PSNH App. J at 85a, it is also true that the decision, read as a whole, affirms the requirement that PSNH's return reflect the appropriate risks pertinent to that Company and that PSNH's capital structure include securities that were issued for the purpose of constructing Seabrook. *See, e.g.*, PSNH App. J at 92a. Although the New Hampshire Supreme Court's language may have been less than precise, its overall holding is clearly correct. Thus, reversal would not be warranted on this point.

struments (with rates "as high as 20 percent," PSNH Jur. Stat. at 8) in its capital structure subject to later prudency review. App. 1 at 6A-8A, 13A-15A. With respect to equity, the PUC rejected a PSNH proposed return of 19% based on risk factors particular to it; however, a risk premium was explicitly recognized. The PUC found a cost of equity of 13%; a figure at the high end of the Staff's Discounted Cash Flow (DCF) range. To that high end cost the PUC added a risk premium of 2% calculated by subtracting the cost of equity of utilities not engaged in nuclear construction from the similar cost of utilities engaged in nuclear construction. Thus, PSNH was allowed the opportunity to earn a 15% return on equity. App. 1 at 8A-13A, 15A-18A.[20]

PSNH seeks to attack the State Court's finding that the rates of return historically allowed the Company adequately reflected risk by claiming that the court ignored: 1) the cost and lead time necessary to construct electric capacity; and 2) the fact that no investors would invest in a utility located in an anti-CWIP state. PSNH Jur. Stat. at 19. There was no error, however, because PSNH's assertions cannot be considered to be relevant "facts."

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[20]PSNH appealed the PUC order based *inter alia* on the issue of whether the PUC adequately recognized PSNH's risk by selecting a number at the high end of the DCF range and adding a 2% risk premium instead of accepting the PSNH number of 19%. *Petition of PSNH*, App. A at 11a-12a. PSNH's assertion that the current appeal involves "a *refusal* by the PUC to include *any* such enhancement of rate of return," PSNH Jur. Stat. at 21, n.20 (emphasis in original), is a clear misstatement. The pending appellate dispute over the *quantification* of a risk premium cannot affect the correct analysis adopted by the New Hampshire Supreme Court that a risk premium had been included in the Company's allowed equity return.

PSNH had proffered no evidence on these points at the PUC and therefore it is not surprising that the PUC made no findings on these points.[21]

PSNH also attaches significance to the fact that the returns discussed above were allowed only on a rate base which, pursuant to RSA 378:30-a, excluded CWIP. Investors have been compensated for the CWIP part of the risk of their investment, however, through the rate at which AFUDC has been and is being capitalized. PSNH will have the opportunity to include this AFUDC in rate base when the facility becomes operational as a part of the facility's cost. Thus, the AFUDC mechanism does not deprive the utility of the opportunity to recover the cost of financing; it merely defers that opportunity until construction is completed. The deferral of compensation, with the corresponding recovery of the cost of deferral, does not deprive the utility of any property (or investment) and thus cannot constitute a taking.

PSNH suggests that compensation through capitalized AFUDC is somehow not real and thus is not just compensation. PSNH Jur. Stat. at 23. However, PSNH

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[21]In any event, investors were clearly on notice of the risks of investing in PSNH at all pertinent times—each PSNH prospectus and other securities' solicitation material disclosed the risk of Seabrook schedule delay and cost escalation. Additionally, all such material issued as of the effective date of RSA 378:30-a disclosed the existence of the statute and the risks attendant thereto. Yet, PSNH had continued access to the financial markets, albeit at the higher costs occasioned by lower bond ratings, up to and including the time of its 1984 financial crisis. As discussed previously, that crisis was triggered by the dramatic increase in PSNH's cost and schedule estimates, not by the existence of RSA 378:30-a, which had been enacted some five years earlier.

has never offered to forego rate base inclusion of the AFUDC portion of Seabrook when and if it seeks rate base treatment for the facility. Indeed, the $464 million rate base addition sought by PSNH in the instant matter has a substantial component of both debt and equity AFUDC. Moreover, until the fall of 1987, when PSNH began to default on interest payments, investors were receiving cash returns on investment; returns that could be higher than 20%.[22] Of course, PSNH investors are now at risk because of pending bankruptcy proceedings, but this is one of the risks for which they received compensation up until the time of default. As noted by the New Hampshire Supreme Court, the Company should not be permitted to receive compensation from ratepayers for risk and then to require ratepayers to pay for the consequences when the risk turns sour. *Petition of PSNH*, App. A at 12a-13a.

The foregoing demonstrates that PSNH begs the question when it asserts that "[s]ubject only to a limitation of ratepayer exploitation, the right to nonconfiscatory, just and reasonable rates is otherwise absolute." PSNH Jur. Stat. at 14. No party has disputed PSNH's entitlement to "just and reasonable" rates; the issue, however, is whether the rates established under the current New Hampshire regulatory structure are "just and reasonable." The New Hampshire Supreme Court correctly determined

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[22]It is true that PSNH has not paid an equity dividend since 1984. However, it has always had the opportunity through rates to earn a reasonable return and it has been capitalizing equity returns as a part of AFUDC. Although the PUC has required that PSNH obtain prior approval before paying a cash dividend, PSNH Jur. Stat. at 8, PSNH management has never sought such approval.

that it was proper for the legislature to establish the regulatory policy. Additionally, the State Court correctly determined that the policy reflects a rational balance of all pertinent interests. Finally, the State Court correctly determined that PSNH investors have received just compensation for the risks allocated to them by the regulatory policy. The *Hope* standard, which provides that no particular ratemaking policy is required, cannot be converted into a prohibition against the adoption of regulatory policies by the appropriate legislative and administrative bodies. Under *Hope,* PSNH's rates are "just and reasonable." Accordingly, this Court should decline to note probable jurisdiction.

———o———

CONCLUSION

Wherefore, appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the New Hampshire Supreme Court.

Respectfully submitted,

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April 29, 1988

APPENDIX 1

Excerpts from *Re PSNH*, 72 N.H.P.U.C. —
(June 29, 1987)

DR 86-122

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE

. . .

IV. *CAPITAL STRUCTURE AND COST OF CAPITAL*

Testimony on the appropriate capital structure was presented by PSNH, the Consumer Advocate and Staff; testimony on the cost of capital, equity, debt and preferred stock, was offered by PSNH and Staff. The Consumer Advocate, in his brief, supported the Staff calculations for equity, but his position on capital structure affects his calculation of the overall costs of debt and preferred as it removes certain capital issues from the weighted average. CRR supported the rate of return position of the Consumer Advocate. The BIA, DOD and did not present testimony or argument on capital structure or cost of capital.

A. *Capital Structure*

1. *Position of the Parties*

PSNH, through its witnesses Professor J. Peter Williamson and Bruce W. Wiggett support the following capital structure:

Common Equity	$1,028,741,000	37.57%
Preferred Stock	321,551,000	11.74
Long Term Debt	1,387,791,000	50.69
Total Capitalization	2,738,083,000	100.00

In Wiggett's Schedules, this capital structure is the calculation of the actual capital structure as of September 30, 1985 (the end of the test year) proformed to reflect the maturity of First Mortgage Bond Series I in June 1986 and Promissory Notes BV and NV in August 1986 and the issuance of the Deferred Interest Third Mortgage Bonds Series A and $100 Million of Pollution Control Revenue Bonds in February 1986. Williamson terms the proposed capital structure appropriate for ratemaking purposes, although "a little high on long-term debt and a little short on common equity" (Exhibit 1, Tab. 6, p. 21) in comparison with the electric industry. The Company does not record the June 1986 write-off of the $353,521,000 investments in Seabrook II and Pilgrim II, or implicitly, treats the write-off as if it occurred equi-proportionally against all components of the capital structure and did not change the component ratios. PSNH adopts this treatment of the write-off because a write-off only against common equity lowers the common equity ratio and thereby lowers the overall cost of capital assuming, as the Company argues, the return on equity exceeds the embedded cost of debt.

The Company argues that the Commission has the authority to adopt a capital structure for ratemaking purposes different from the capital structure as shown on the books of the Company. In particular, it cites various rate cases of the New Hampshire Electric Cooperative as well as PSNH's last rate case, in which the Commission approved the use of "target ratios" rather than an actual capital structure. PSNH concludes that to reduce the allowed rate of return on existing rate base by adjustments to the component ratios of the capital structure when

substantial amounts of uncompleted plant are written off is to further weaken the financial integrity of a Company that has just suffered the write-off.

Staff through its witness, Dr. Sarah P. Voll, proposes the following capital structure (Ex. 49, Att. 1, p. 1):

Common Equity	$ 817,137,738	32.14%
Preferred Stock	312,127,087	12.28
Long Term Debt	1,412,924,904	55.58
Total Capitalization	2,542,189,729	100.00

Staff's capital structure represents the Company's actual capital structure as of August 31, 1986 as it appears on the books of the Company, adjusted for unamortized premiums and discounts. It therefore includes not only the additions and deletions of capital issues as proformed by the Company, but the write-off of the Seabrook II and Pilgrim II investments against retained earnings. Staff contends that the accounting standards require that cancelled plant be written off against retained earnings, in part since prior to a plant being used and useful the investment is made at the stockholders' risk. Staff argues then that its proposed capital structure best reflects the reality of the events that affected the Company's capital structure through August 1986.

2. *Commission Analysis*

The Commission agrees with the Company that we have the authority to adopt for ratemaking purposes a capital structure different from that which appears on the Company's books at any given time. In general, how-

ever, the Commission adopts a hypothetical capital structure either to reflect more accurately the general reality of the period during which the rates will be in effect, or to encourage the utility to conform this reality to a desired optimum. The Commission's acceptance of "target ratios" in the last rate case was an example of the former case. During the period while the rates were in effect, the "target ratios" were expected to represent, on average, the Company's capital structure more closely than any instantaneous set of capital ratios taken at any particular point during the Company's financing program.[1]

The Company's proposal in the instant case is founded on neither of the reasons the Commission has in the past adopted hypothetical capital structures. It does not accurately reflect an expected reality, as PSNH has in fact written off the cancelled plant against common equity. The debt issues remain intact in the Company's capital structure as on-going obligations of the Company, regardless of the reduction to rate base. Nor will a hypothetical capital structure serve to encourage PSNH to move in an optimal direction, in this case to increase the equity component in its capital structure. Professor Williamson has testified that "the Company has found new offerings of common or preferred stock not to be practical until dividends are restored" (Ex. 31, p. 18); and Staff apparently agrees: "PSNH has no intention of raising capital through offerings of common stock until the stock price has sub-

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[1] The New Hampshire Electric Cooperative cases cited in brief by the Company do not apply. The 70:30 proforma capital structure was proposed by the NHEC witness but not adopted by the Commission. The Commission's findings were based on TIER coverage rather than hypothetical capital structure.

stantially recovered." (Voll, Ex. 13, p. 16). In addition, the Company's argument that reductions in the allowed rate of return should not be allowed to further weaken the financial integrity of a Company that has just suffered a write-off depends on the relationship between the Company's embedded cost of debt and marginal cost of equity. Where a Company's embedded cost of debt is heavily weighted by financings that were issued in periods of high interest rates, its marginal cost of equity reflecting a period of lower interest rates will not necessarily exceed the debt costs. Therefore, a lower equity component ratio will not necessarily result in a lower overall allowed rate of return and a further weakening of the Company's financial integrity.

We do not find that the Company has presented sufficient evidence or argument to cause us to adopt a hypothetical capital structure in the instant case. We find that the Staff recommendation best represents the reality of the PSNH capital structure and will accept it for purposes of this docket.

B. *Cost of Capital Debt and Preferred Stock*

1. *Position of the Parties*

The Company recommended costs of debt and preferred stock based on the weighted averages of the issues in its proformed capital structure, calculated according to a yield to maturity methodology. The results, as updated, were 13.41% on preferred stock and 15.18% on long term debt (Ex. 33, Sch. IV, p. 2; Sch. V, p. 4.)

Staff, using the accounting based embedded methodology as adopted by the Commission in DR 77-49,

Re Public Service Company of New Hampshire, obtains results of 13.28% on preferred stock and 15.28% on long term debt. Ex. 49, p. 3 and Att. 1, pp. 1-3. In addition, Staff noted that it views the current rate case as a pre-Seabrook interim rate case and the prudency of the debt financings is being examined by the Commission as part of the Seabrook prudency audit. Staff therefore recommended that its calculations be adopted subject to refund pending the outcome of the Commission deliberations in the Seabrook rate case.

Given that the results of the two methodologies were very similar, the parties agreed to accept Staff's results without prejudice, although PSNH does not accept Staff's methodology to the exclusion of PSNH's method in calculating the costs of debt and preferred stock.

2. *Commission Analysis*

The Commission finds the agreement of the parties reasonable given the similarity of the results in this docket. We will defer findings on appropriate methodologies in the calculation of the cost of debt and preferred stock to a future rate case.

The Commission notes the Staff recommendation that its calculations be adopted subject to refund. The Commission also views the current rate case as an interim rate case. Our orders cited by Staff were premised on the assumption that the next rate case would be the Seabrook rate case and that the prudency of the cost rates would be determined concurrently with the prudency of the entire Seabrook investment. Our acceptance of the Staff calculations in this interim case should not be viewed as a finding on the prudency of the cost rates on

the Seabrook related debt issues. Rather, that prudency determination will be made when the Seabrook investment is rate based, and we intend to reconcile all issues of prudency at that time.

The Commission unanimously agreed that cost rates imprudently incurred must be refunded to ratepayers, but reach an impass on the method to implement the refund. The problem developed from the Commission, in previous decision dating back to 1982, deferring the prudency issue until a thorough prudency review of the construction project was concluded. When those decisions were made, everyone contemplated the next rate case to be the prudency case. No one has yet developed a record to determine any imprudency or quantify same. In fact, the Commission is currently utilizing a consultant to assist it as the prudency docket is processed.

The Commission is confronted in this rate case with the requirement of RSA 378:6 which mandates that permanent rates be filed by June 30, 1987. To fix rates one day and the next day declare those rates as temporary rates is not an appropriate method to employ and is subject to be attacked as a ploy by the Commission to circumvent the requirement of RSA 378:6.

The majority of the Commission is convinced that the Company was on notice before this hearing and during the course of this hearing that the questions of prudency would be deferred until a prudency hearing was conducted. We believe that fairness and equity dictates that it be done after a full and complete hearing. If the parties had an objection to this procedure, they had the opportunity to address it. They did not; therefore, we are confident that

making the rates of this proceeding subject to refund for the limited purpose of determining what portion of the costs rates for debt was imprudent is proper, fair and equitable. The dissenting view would not eliminate the problem of retroactive ratemaking. The majority's objective is to defer the issue until a full prudency hearing can be concluded. The difference of opinion between the majority and the dissent is in adopting the proper methodology.

C. *Cost of Capitol—Common Equity*

1. *Position of Parties*

Public Service Company recommended a return on equity of 19% based on the direct, supplementary and rebuttal testimony of its witnesses Prof. J. Peter Williamson and Robert G. Rosenberg and the rebuttal testimony of Daniel P. Rudakis.

Williamson estimates PSNH's cost of equity using a risk premium methodology. In his December update (Exh. 8) he reaffirms his earlier finding of 19% using the same methodology as in his original testimony. He calculates risk premiums of PSNH debt instruments above Baa Yields by comparing PSNH prices and yields to maturity to the Moody's Baa average. He derives a premium for preferred stock by using a discounted cash flow under varying assumptions of the resumption of dividend payments on preferred stock. His results are as follows:

First Mortgage Bonds	Baa yield + 1 to 1½%	= 10.8% to 11.3%
G&R Bonds	Baa yield + 4%	= 13.5%
Debentures	Baa yield + 4.5%	= 14.3%
Preferred Stock	Baa yield + 8 to 10%	= 17.1% to 19.1%

Williamson then places a conservative estimate of the cost of common equity at 18-20%, 100 basis points above

the cost of preferred, and recommends 19% as the midpoint.

Rosenberg estimates the cost of common equity using a discounted cash flow (DCF) methodology based on a sample of 30 nuclear constructing companies as 13.30%. Exh. 27, p. 3. He then develops two risk premiums to measure the risk differential between PSNH and the sample by comparing the yields on their first mortgage bonds (4.92 - 5.30) and on their most junior securities (4.88 - 5.01). Therefore, his two analyses result in the following ranges: 18.22 - 18.60%, and 18.18 - 18.31%. However, recognition of two additional risk factors not captured by his risk analysis, the uncertain status of PSNH dividends and PSNH shareholders riskier position compared to debt holders with regard to regulatory outcomes, result in a recommendation of 19%. Resenberg also performed a comparable earnings analysis based on data ending in January 1986 in his original testimony but did not update it for consideration at the time of the hearings.

Staff presented the testimony of Dr. Sarah P. Voll who recommended a range of 11.63% to 13% with a point estimate of 11.94%. She utilized the DCF methodology to analyze a group of 35 electric companies of approximately similar size as PSNH. Her 11.94% result is based on the average of the entire sample using historical growth rates while the upper end of the range (13%) reflects the expectation that investors probably expect future growth rates to be healthier than the growth rates of the immediate past. 6 Tr. 610-611. Voll states that it is inappropriate to recognize for ratemaking purposes the level of return desired by investors in PSNH common stock. She

argues that PSNH is viewed as a speculative investment by investors, and that "profits such as are realized or anticipated in . . . speculative ventures" offend the judicial standard as enunciated in *Bluefield Water Works & Imp. Co. v. Public Service Comm. of West Virginia*, 262 U.S. 679, 692-693 (1923) [hereinafter cited as *Bluefield*].

2. *Commission Analysis*

The three rate of return witnesses have presented the Commission with a wide range of estimates of the allowed cost of equity for PSNH. The estimates are calculated according to two different methodologies, the risk premium (Williamson) and the DCF (Voll) or a combination of both (Rosenberg). In general, this Commission has found the DCF method based on a sample of comparable companies to be the preferred methodology. Risk premiums themselves are subject to considerable variation during different time periods and at different interest rate ranges, with the spreads between equity and debt being particularly uncertain. In the instant case we are particularly troubled by the uncertainty surrounding Williamson's calculation of the risk premium of the preferred, which requires assumptions concerning investor expectations on the resumption of preferred dividends, and on the lack of documentation of the spread between preferred and common, especially in his update. Therefore we will base our findings on the DCF methodology as presented by Voll and Rosenberg, as well as taking note of the Federal Energy Regulatory Commission's (FERC) DCF derived generic rate of return of 11.43% covering the period November 1, 1986 to January 31, 1987 as reported at FERC Statutes and Regulations, ¶ 14,059.

The DCF methodologies from these three sources are approximately the same and, using Rosenberg's update, are based on data from similar time periods. The difference in the results stems primarily from the differing samples. Voll's 11.94% (historical growth rates) and 13% (forecasted growth rates) are based on a sample of 35 smaller electric utilities, including both companies with and without nuclear involvement. The FERC bases its estimate (11.43% for the six-month time period ending September 30, 1986) on a sample of 100 electric utilities of varying sizes. Rosenberg's sample of 30 companies is essentially the nuclear sub-set of the FERC sample and produces a basic DCF result of 13.30%.

The fundamental disagreement between the Voll and Rosenberg lies not in their DCF results but in the risk premium to be assigned to PSNH to recognize the riskiness of its nuclear involvement. The existence of that added risk is not a matter of dispute: Voll noted in both prefiled (Exh. 13, p. 116) and oral (6 Tr. 621) testimony that PSNH was riskier than her sample. In fact, she bases her non-recognition of an added risk premium on the argument that PSNH is so risky that from an investor perspective, its stock is a speculative investment.

Of the available DCF analyses, we find the sample used by Voll of 35 of the smaller electrics to be most appropriate. We will accept the upper end of her range (13%) as an estimate of investor expectations on the performance of an average of the smaller electric utilities in the period during which rates will be in effect. We find that her point estimate of 11.94% is too low. That estimate is based on historical data and includes 18 companies with nuclear involvement for whom investors undoubt-

edly expect healthier levels of dividends and earnings growth in the future than they have experienced in the past. To compensate for this reasonable expectation, we choose the upper end of Dr. Voll's range of 13% as reasonable.

The final question is what risk premium, if any, should be added to this DCF result to recognize the added risk of PSNH. While we agree with Staff that full recognition of the investor required return may offend the standards enunciated in *Bluefield* concerning speculative investments, we do not agree that it logically follows that *Bluefield* prohibits any recognition of added risk. There is unquestionably a level of added investor risk that accompanies an electric utility's involvement in nuclear construction even for companies that are by no means speculative. The dissent fails to recognize this reality. We believe that an estimate of this greater than average risk can be obtained by comparing the FERC DCF analysis based on a sample of diverse companies (11.43%) to Rosenberg's results based on a sample of companies with nuclear involvements (13.30%). This differential of 187 basis point represents a legitimate "greater than average" risk faced by companies with nuclear construction programs that in no way offends the *Bluefield* strictures against returns on speculative ventures. We will therefore add this risk premium to the DCF result of the 13% return on the sample of diverse smaller electric utilities to obtain a return on equity of 14.87%. For ratemaking purposes, we find 15% to be a reasonable estimate of the return on equity for PSNH.

Based upon the foregoing analysis, the cost of capital is calculated as follows:

	Total	Percent Rate	Cost Weighted Cost
Long Term Debt	55.58%	15.28%	8.49%
Preferred Stock	12.28	13.28	1.63
Common Equity	32.24	15.00	4.82
Total	100.0%		14.94%

. . .

VI. SEABROOK CAPITALIZATION

The Consumer Advocate objects to including in the cost of capital, for ratemaking purposes, the amount and cost rate of any securities which could have provided sources of funds for PSNH's Seabrook construction program. The Consumer Advocate uses the same rationale to support his motion to dismiss PSNH's petition. The Consumer Advocate argues that PSNH's request for a return on rate base is derived from a weighted average of all the Company's capital including capital invested in Seabrook. He concludes that this methodology violates the provisions of RSA 378:30(a). This is the third time that the Consumer Advocate raises this issue. (See *Re PSNH*, 65 NHPUC 251, 275-276 (1980); *Re PSNH*, 69 NHPUC 45, 53 (1984).)

In *Re PSNH*, 69 NHPUC 67, 83-86, [57 P.U.R. 4th 563, 578-581,] the Commission addressed the identical issue presented in this proceeding and concluded that RSA 378:30(a) does not address the methodology used to determine an appropriate rate of return and held that RSA 378:30(a) does not act as a barrier to recovery of Seabrook related costs as part of the utility's rate of return.

The Commission did not rest its decision on the factual evidence, but rather, on the Commission's interpretation of RSA 378:30(a). *Re PSNH,* 69 NHPUC 65, 85-86 [57 P.U.R. 4th 563, 580-581].

The Consumer Advocate attempts to rely on language used by the Court in *Re PSNH,* 125 N.H. 46 (1984) as authority to require a departure from the previous decisions of the Commission. We do not agree with the Consumer Advocate's interpretation of that case.

The analysis that a particular cost rate for a particular security instrument is reasonable is an issue which must be undertaken in the context of a financing proceeding pursuant to RSA 369. Therein the terms and conditions, among other things, are examined as to reasonableness in light of current market conditions. When the Commission developed a concern over the impact on rates, it reversed any prudency determination. 67 NHPUC 956; 68 NHPUC 5; 68 NHPUC 118; 68 NHPUC 418; 68 NHPUC 412; 68 NHPUC 612; 69 NHPUC 279. The Commission is currently examining the entire prudency issue of the Seabrook project and has engaged a consultant to assist it. The results of that proceeding will be applied to all issues of prudency appropriate for ratemaking.

Although the Commission did not rely on the factual evidence in past proceedings and does not do so herein, it should be observed that Dr. Voll's analysis in DR 82-333 was only a first approximation and that many adjustments would have to be made including adjustments for a risk premium and overall cost of money for the Company. Dr. Voll's testimony in this proceeding is similar and consistent with her testimony in DR 82-333. Tr. Vol. 6, pp. 495-501. Dr. Nichols, the Consumer Advocate's

witness in this proceeding, did not do any independent analysis but noted that his methodology simply extended upon Dr. Voll's testimony. Tr. Vol. 13, p. 70. Nor did he read or analyze the previous decisions of the Commission. Tr. Vol. 13, p. 71. He merely relied on what the Consumer Advocate instructed him as to the facts and the law. The record does not reflect any evidence or compelling reason to justify departure from the previous Commission orders or from the long-standing Commission practice.

The Commission has re-examined its prior decisions and the evidence presented in this proceeding and finds there is no compelling reason to change the methodology for calculating rate of return.

Based on the above reasons, the Consumer Advocate's Motion to Dismiss PSNH's Petition is denied.

. . .

DR 86-122

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

. . OO . .

Opinion of Commissioner Aeschliman

Dissenting in Part

At the conclusion of this proceeding Public Service Company of New Hampshire (PSNH) was supporting a revenue deficiency of $38,682,000. (PSNH Brief, Appendix A) The majority opinion provides for a rate increase of $20,490,866. I would grant a rate increase of

$13,699,592. The difference of $6,791,274 is based upon different findings relative to the appropriate rate of return on equity to allow for ratemaking purposes in this case. The majority has allowed 15%; I would allow 13%. There are also procedural differences in the manner in which we would treat revenues related to the debt cost component of the rate of return.

. . .

Rate of Return on Equity

The majority has calculated rates based upon a 15% return on equity. This is a very high return given prevailing market rates. For comparison, the rate of return on equity granted to PSNH in January 1984 was 16.1%. Since that time interest rates have fallen some 400 basis points, and a comparable rate of return today would be closer to 12%. I would allow a 13% return which Dr. Voll's testimony indicates is the "plausible upper limit for a reasonable return on equity for ratemaking." (Exh. 14, p. 9). A return at this level gives appropriate recognition to the risk of nuclear construction. The majority in adding an additional premium double counts this risk.

The rate of return on equity is derived from an analysis of market data rather than from Company specific cost rates which are used in the calculation of debt costs. The primary methodology used in this jurisdiction is the discounted cash flow (DCF) analysis. This analysis involves the selection of a sample of utility companies of similar size and business risk from which the data is obtained to perform a DCF analysis.

Dr. Voll's testimony indicates that an appropriate sample is one that includes relatively small electric utilities, particularly those that are involved in the con-

struction of nuclear power plants but have not experienced the type of liquidity crisis that would lead to a suspension of dividends and would place them in the category of speculative investments. (Exh. 13, p. 17). Her DCF analysis for utilities with construction programs resulted in a total expected return of 11.63% (Exh. 14, p. 18). This return was actually lower than the return for non-nuclear utilities because the historical dividend growth rates for the nuclear utilities was very low resulting in a slightly lower total return even though the required yield was higher. If forecasted dividend growth was used rather than the historical growth rate, the expected return for utilities with construction programs was calculated to be 12.94%. It is important to note that the 12.94% applies only to nuclear constructing utilities and not to Dr. Voll's sample of 35 utilities as a whole. The 12.94% provides the basis for Dr. Voll's conclusion that 13% is the upper limit that can be justified by the DCF analysis. (Exh. 14, p. 19 Rev.).

The majority has taken Dr. Rosenberg's DCF sample which comprises large nuclear constructing utilities and has derived from his analysis a risk premium for this group of nuclear constructing utilities compared with a Federal Energy Regulatory Commission (FERC) sample of diverse utilities. Their analysis then adds Dr. Rosenberg's risk premium to Dr. Voll's upper limit of 13% to obtain a 14.87% rate of return which is then apparently rounded up to 15%.

There are two basic flaws to this approach. First, Dr. Rosenberg's sample of large nuclear constructing utilities is not an appropriate comparison group because their size is not comparable to PSNH. It should also be noted

that Dr. Rosenberg's analysis for nuclear constructing companies yields a result of 13.3% which includes the premium for risk of nuclear construction. Second, Dr. Voll's upper limit of 13% already includes an adder for nuclear constructing utilities above the 11.94% calculated return for her diverse sample of small utilities. Thus, the difference between 11.94% and 13% is a risk premium for small nuclear constructing utilities. To add a further premium double counts the risk. Consequently, the majority has reached a result which is not supported by the testimony of any expert witness and which cannot withstand critical analysis. Since Dr. Rosenberg's analysis and Dr. Voll's analysis incorporate nuclear risk in reaching their 13.3% and 13% DCF results, a 15% level can only be reached by adding additional risk premiums due to PSNH's speculative situation.

My analysis would result in an overall rate of return of 14.30%, which is a high return by present market standards. It is the most I believe should be allowed in this case absent a prudency review.

MOTION FILED
APR 29 1988

No. 87-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant,

vs.

NEW HAMPSHIRE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW HAMPSHIRE.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE AND AMICUS CURIAE BRIEF OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF APPELLANT

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No. 87-1613

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

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Appellant,

vs.

NEW HAMPSHIRE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF NEW HAMPSHIRE.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Official Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee") appointed on April 15, 1988, in the bankruptcy case of Public Service Company of New Hampshire ("PSNH") respectfully moves for leave to file the attached brief *amicus curiae* in support of the Appellant's Jurisdictional Statement. The consent of the attorney for the petitioner and of the State of New Hampshire has been obtained. The consent of the Consumer Advocate was requested and declined. The consent of the Campaign for Ratepayers' Rights was requested and declined.

The interest of the Equity Committee in this case arises because it represents approximately 11,000 holders of thirteen different series of PSNH preferred stock having a par value in excess of $430 million. The Equity Committee also represents approximately 45,000 common stockholders with an average holding of 800 common shares with a total par value of approximately $186 million. Both the common and some series of preferred stock are traded on national stock exchanges. PSNH has omitted dividends on its common and preferred stock since

April 1984; the amount of cumulative preferred stock dividends in arrears as of December 31, 1987 was approximately $158 million.

In the instant case, the persons most affected by the unconstitutional taking of property are the stockholders represented by the Equity Committee since it is their investment which is most likely to be adversely affected in any bankruptcy reorganization unless relief from New Hampshire Rev. Stat. Ann 378:30-a is obtained.

This case is important not only because it affects 56,000 public investors with a total investment of over $500 million, but also because it puts directly at issue the constitutionality of a form of state law that improperly impinges on the rate making process.

The Equity Committee urges the Court to note probable jurisdiction and to permit the Equity Committee to participate as *amicus curiae*.

Respectfully submitted,

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Counsel of Record

April 29, 1988

QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application thereof denying utility investors any recovery of or on investment in electric generating plant fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

PARTIES TO THE PROCEEDING

The petitioner below was Public Service Company of New Hampshire. The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

Rule 28.1 Listing

Amicus, the Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee"), is an official committee appointed in the Chapter 11 bankruptcy case of Public Service Company of New Hampshire pursuant to 11 U.S.C. §1102(a)(1). The Equity Committee has no parent companies, subsidiaries or affiliates. The members and *ex officio* members of the Equity Committee are:

The Mutual Benefit Life Insurance Company
Monarch Life Insurance Company
Donald G. Smith of Donald Smith & Co.
Richard L. Greenberg of Donald Smith & Co.
Certified Reporting Co. by James K. Arthur
Milton F. Lewis
Patrick Mainolfi
Daniel W. B. Tarbell
Mutual Service Life Insurance Co.
The Prudential Insurance Company
of America (*ex officio* member)

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AMICUS CURIAE BRIEF OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF APPELLANT

INTEREST OF THE EQUITY COMMITTEE AS AMICUS

The Official Committee of Equity Security Holders of Public Service Company of New Hampshire (the "Equity Committee") was appointed on April 15, 1988 pursuant to Section 1102 of the Bankruptcy Code. The Equity Committee represents both common and preferred stockholders of Public Service Company of New Hampshire ("PSNH").

The equity investors whose interests have been adversely affected by the judgment appealed from are located throughout the United States. Most of the investors are small common stockholders with an average shareholding of only 800 shares. In total, approximately 45,000 common stockholders hold

common stock with a total approximate par value of $186 million as of December 31, 1987, and a significantly lower market value as a result of the PSNH bankruptcy. Holders of preferred stock of PSNH, $25 par value, are also small holders, with the vast majority of the preferred stock held in accounts of less than 500 shares. In total there are approximately 11,000 holders of thirteen series of preferred stock with a total par value of more than $430 million. Many of the preferred series were issued before May 7, 1979, the effective date of New Hampshire Rev. Stat. Ann. 378:30-a.

Common and preferred stockholders have not received a return on their investment since April 1984, when PSNH stopped paying dividends. Cumulative preferred stock dividends in arrears as of December 31, 1987, were approximately $158 million. More importantly, the filing by PSNH of a petition for reorganization under Chapter 11 of the Bankruptcy Code now threatens to wipe out equity investors totally, not merely eliminate a return on the PSNH investment in the Seabrook Nuclear Generating Station ("Seabrook").

STATEMENT OF THE CASE

The Equity Committee adopts the Statement of the Case by PSNH.

ARGUMENT

I. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT IMPERMISSIBLY ELEVATES AN INFLEXIBLE FORMULA OVER THE END RESULT TEST.

The New Hampshire Supreme Court has permitted the elevation of an inflexible legislative ratemaking formula without regard to the end result and whether the consequences are just and reasonable.

> It is axiomatic that the end result of Commission rate orders must be "just and reasonable" to both consumers and investors, and that, in achieving this balance, the Commission must consider the impact of its rate orders on the financial integrity of the utility.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1172 (D.C. Cir. 1987) (en banc).

In *Jersey Central* the allegations that the utility had not paid dividends on its common stock for four years and had no access to long term capital markets were sufficient to suggest that the regulatory commissions' actions were improper under the end result test of *FPC V. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*"). The allegations were sufficient to require a hearing on the adequacy of allowed rates. Here, PSNH has not paid dividends on common and preferred stock for over four years. In addition, the New Hampshire Public Utilities Commission ("PUC") found that PSNH's financial integrity was in danger. Nevertheless, the PUC concluded it could not engage in the balancing required by *Hope*.

In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court held that the rate order could not be affirmed simply because each of the component decisions, taken in isolation, was permissible. Here, the New Hampshire Supreme Court has held that the theoretical correctness or legality of a single dominant component of the ratemaking methodology (*i.e.* that since

Seabrook is not in service PSNH's investment in Seabrook cannot be considered in setting rates) precludes balancing other interests and renders the reasonableness of the "end result" irrelevant. However, this approach has been consistently rejected:

> Moreover, an order cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1178 (D.C. Cir. 1987) (en banc).

This case is of public importance because it draws into issue whether it is ever appropriate for a state to prohibit recovery on or of a prudently made investment solely because the facility is not in service, without regard to the reasons why the facility is not in service. Intuitively, the reason a facility is not in service is important and should be considered in any balancing of the interests of ratepayers and equity investors. It should make a difference whether the facility is not in service because lax management resulted in it being poorly constructed or because of changing political winds or other circumstances outside management's control. The New Hampshire anti-CWIP statute should be held unconstitutional as a statement that state legislatures cannot circumvent the *Hope* balancing test by predetermining what goes into the balance.

The judgment appealed from has undermined the fundamental concept that ratemaking is the product of expert judgment, since the New Hampshire anti-CWIP statute has removed all discretion from the PUC to exercise its expert judgment and balance the interests of ratepayers and investors.

The bankruptcy of PSNH mandates that a PUC hearing be held without the restrictions of RSA 378:30-a at which hearing the PUC can undertake a reasoned balancing of ratepayer and investor interests.

II. THE DECISION APPEALED FROM THREATENS TO DESTROY THE INVESTORS INTEREST IN PSNH, NOT MERELY TO DENY INVESTORS A RETURN ON THE INVESTMENT IN SEABROOK.

PSNH is now a debtor in bankruptcy. As its reorganization case progresses, it will be valued for different purposes, including a judicial determination as to what interest may be retained by its equity investors under a plan of reorganization. Since an issue in valuation for reorganization purposes may be how much PSNH can earn, by excluding the possibility of any future income relating to the PSNH investment in Seabrook unless it is in service, the decision of the New Hampshire Supreme Court threatens to potentially wipe out equity investors, not merely reduce their return. The anti-CWIP law holds out hope that when Seabrook goes into service then equity investors can receive their enhanced return for bearing all the risk. However, in bankruptcy time limits imposed on proposing and confirming a reorganization plan may force the valuation of the equity investors' interest in PSNH before Seabrook goes into service. Without any current return on or of the PSNH investment in Seabrook the value of equity interests (and their participation in a reorganized PSNH) may be unfairly reduced, resulting in an unjust taking of the property of equity investors.

In his dissent in *Hope*, Justice Frankfurter said that the challenged rate orders must be founded on due consideration of all elements of the public interest, that the "public interest" included more than contemporary investors and contemporary consumers and that "social as well as economic costs must be counted." 320 U.S. at 627. In this case, the social and economic costs to equity investors caused by PSNH's bankruptcy are enormous and can only be addressed and balanced by an appropriate hearing before the PUC free of the restrictions of the anti-CWIP statute.

CONCLUSION

The social and economic costs at issue in this case are of such public importance that the Court should exercise its jurisdiction and review the judgment of the New Hampshire Supreme Court.

Respectfully submitted,

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(4)

NO. 87-1613

IN THE

Supreme Court of The United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court
Of New Hampshire

MOTION OF APPELLEE, MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO DISMISS OR AFFIRM

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MOTION OF MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1, Appellee, Michael W. Holmes, Consumer Advocate, (hereinafter, Office of the Consumer Advocate or OCA)[1], hereby moves that this Honorable Court dismiss the appeal of Public Service Company of New Hampshire, on the grounds that the appeal does not present a substantial federal question and that the federal issues were not timely or properly raised. In the alternative, the OCA moves that the Court affirm the decision of the Supreme Court of New Hampshire rendered below.

COUNTERSTATEMENT OF CASE

On or about January 1972, Public Service Company of New Hampshire (PSNH or Company) proposed to construct two 1150 megawatt (MW) nuclear reactors at Seabrook, New Hampshire. (Seabrook Unit I and Unit II). The estimated cost of each Unit was $486 million. Unit I's commercial operation date originally was November 1979, and Unit II was November 1981.[2] Seven years late and *billions* over original estimates, Seabrook Unit I was *completed* in October, 1986. Seabrook Unit II was allegedly cancelled in 1986.[3] The Company is unable to predict when or if Seabrook Unit I will enter

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[1] The OCA is an agency of the State of New Hampshire authorized to represent the interests of New Hampshire residential utility consumers before the New Hampshire Public Utilities Commission and any state or federal agency or court in which the interests of the residential utility consumers are involved. N.H. Rev. Ann. 363:28 (Supp. 1987). Appellee, Michael W. Holmes, has served as the Consumer Advocate of New Hampshire since 1983.

[2] *See Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 649, 507 A.2d 652, 682 (1986).

[3] Although PSNH publicly announced this Unit's cancellation, the construction permit has not yet been returned to the Nuclear Regulatory Commission.

commercial operation.[4] PSNH now assumes for financial planning purposes that Seabrook Unit I will enter commercial operation on January 1, 1990.[5] The total project cost is increasing by $50 million per month.[6]

PSNH sought protection from its creditors under the Bankruptcy Code on January 28, 1988. At the root of the company's problems is its ownership of a share of a nuclear generating facility, disproportionate in relation to its customer base[7], that is arguably located in the wrong place[8]. New Hampshire law prevents PSNH from collecting for Seabrook until it operates. N.H. Rev. Stat. Ann. 378:30-a (1984). Unlike other electric utilities, PSNH either steadfastly refused or was simply unable, until too late, to modify its original investment plans to reflect changing and current realities. Neither the New Hampshire Public Utilities Commission (PUC) or the consumers had any right to interfere with this utility's investment plans.

Determined to become northern New England's major power producer, the Company's management undertook a nuclear construction project of a size and magnitude usually reserved for electric utilities serving major metropolitan areas rather than rural New Hampshire. Original plans called for PSNH to own a 50% share of each Unit (1150 MW total entitlement), and be the "lead owner" of the project. The other

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[4] PSNH, SECURITIES AND EXCHANGE COMMISSION, FORM 10-K, ANNUAL REPORT (MARCH 27, 1987).

[5] PSNH, SECURITIES AND EXCHANGE COMMISSION, FORM 10-K, ANNUAL REPORT (MARCH 30, 1988).

[6] *See Petition of PSNH*, 130 N.H. _____, _____ A. 2d _____ (Jan. 26, 1988), slip opinion at 2, (*Jurisdictional Statement*, Appendix A).

[7] PSNH's investment in Seabrook is over three times that invested in its *entire* system. *See Jurisdictional Statement* at 23.

[8] *See Re: PSNH*, 14 N.R.C. 279 (1981), *aff'd, Seacoast Anti-Pollution League (SAPL) v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982).

utilities (Joint Owners) owning shares of the plant are New England utilities and members of the New England Power Pool. (NEPOOL).[9]

PSNH had never undertaken to finance and construct a generating station of this size, indeed, it had never before attempted to be the "lead owner" of a nuclear generating facility or any other NEPOOL Joint Ownership Project. The company's largest investment prior to Seabrook was the 400 MW oil-fired generating station located at Newington, New Hampshire. Newington's five-year construction program was completed in 1971 at a total cost of $159 million.

At issue is whether PSNH's investors have been properly rewarded for the results of these miscalculations. More fundamental still, is whether capitalism has any meaning when investors actually encounter the harsher side of the risk/reward relationship. If it does, PSNH's investors have received all to which they are entitled.

New Hampshire has traditionally used the method of an Allowance For Funds Used During Construction (AFUDC) to provide a return to the utility during a plant's construction period.[10] By the late 1970's, PSNH was claiming it needed Construction Work In Progress (CWIP) in rates and could not support its 50% share in the Seabrook project without a

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[9] "NEPOOL has been described as 'a regional power-pooling system' with a membership of approximately sixty New England utilities which collectively contain roughly ninety-eight percent of New England's generation capacity. *See Appeal of New England Power,* 120 N.H. 866, 870, 424 A.2d 807, 810 (1980), *rev'd on other grounds sub nom., New England Power Co. v. The State of New Hampshire,* 455 U.S. 331 (1982). NEPOOL's objectives 'are to assure the reliability of the region's bulk power supply' and to attain 'maximum practicable economy' through, inter alia, 'joint planning central dispatching ... coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants ....'" *Appeal of CLF,* 127 N.H. at 632, 507 A.2d at 670, citing, *New England Power Co. v. New Hampshire,* 455 U.S. 331, 334 (1982).

[10] *See Appeal of Pub. Serv. Co. of N.H. (PSNH),* 125 N.H. 46, 50, 480 A.2d 20, 22 (1984).

change in ratemaking methods. This was probably accurate, although PSNH was able to complete Unit I at its current ownership percentage on or about October 1986. On May 28, 1978, some years after construction on the project had gotten underway, PSNH petitioned the PUC to include a portion of CWIP into the company's rate base so as to receive a current, rather than deferred (AFUDC) return, on plant under construction.

After the PUC authorized this historic inclusion of CWIP in rate base, the decision was upheld by the New Hampshire Supreme Court as within the PUC's discretion.[11] The Legislature, in response to public opposition to this change in traditional ratemaking methods, passed N.H. Rev. Stat. Ann. 378:30-a (1984), (the so called anti-CWIP statute). This statute codified the traditional ratemaking method of used and useful, and eliminated the PUC's discretion to award rates based on CWIP.

> "Throughout the life of the Seabrook project, with the exception of the limited period between PUC order No. 13,162 (May 25, 1978) which included CWIP in the company's rate base, see *LUCC v. Public Service Co. of N.H.*, 119 N.H. 332, 402 A.2d 626 (upholding order as a matter of policy), and the effective date of 30-a (May 7, 1979), CWIP has been excluded from the rate base. This is not a situation, for example, in which the anti-CWIP law was enacted on the eve of the loss itself so that enforcing it would preclude both a return commensurate with risk and a recoupment of the loss."[12]

The passage of the anti-CWIP Statute, reestablished the historic status quo, and the Company determined it could not

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[11] *See Re PSNH, 63 N.H.P.U.C. 127 (1978), aff'd, Legislative Utility Consumers' Counsel (LUCC) v. PSNH*, 119 N.H. 332, 402 A.2d 626 (1979).

[12] *Petition of PSNH*, slip opinion at 9.

support an ownership level greater than 28% in both plants.[13] Yet the Company failed to sell down to that level and still owns 35.6% of Seabrook.[14]

By 1981, questions were being raised at the Nuclear Regulatory Commission (NRC)[15] concerning the Seabrook site and possible problems in evacuating the population in such a high density area in the event of an emergency at the plant. The positions of those who maintain Seabrook cannot cope with emergencies was established long before the 1988 Presidential Campaign. PSNH does not seek recovery in rates from those whom it alleges caused its licensing problems, but from those who have cooperated in the Seabrook licensing process.

From the beginning, this project was a very significant undertaking for a company as small as PSNH. While it is the largest electric utility in New Hampshire, it serves less than 350,000 customers.[16] The level of financing required to complete this project is unprecedented in New Hampshire utility history. It is probably unprecedented nationally on the basis of cost per installed kilowatt of capacity.

By the spring of 1984, the Company was insolvent. Its commercial bankers had had enough of the "Brazil" of electric utilities and refused to extend further credit.[17] In response, rather than sell down their Seabrook interest to a size it could handle, the Company proposed a "Ponzi"scheme in which it issued almost $1 billion of "junk bonds" in a three-step financing plan

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[13] *See Appeal of LUCC*, 120 N.H. 173, 174, 412 A.2d 738, 739 (1980).

[14] Under buyback agreements with other utilities resulting from the sell down to 35.6%, PSNH is in reality still responsible for approximately 42.09% during the early years of Seabrook's operation. Not until after Seabrook has been in commercial operation for seven (7) years does PSNH's ownership percentage equal 35.6%.

[15] *See Re PSNH*, 14 N.R.C. 279 (1981), *aff'd*, *SAPL v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982).

[16] PSNH, FERC FORM NO.1 : ANNUAL REPORT OF MAJOR ELECTRIC UTILITIES, LICENSEES AND OTHERS (1987).

[17] *See Jurisdictional Statement* at 5.

called "Newbrook". Step One involved, the issuance of $90 million worth of short term financing.[18] Step Two involved the sale of debentures and warrants, the object of which was to retire the $90 million indebtedness incurred as Step One, plus $335 million in new money ($425 million total).[19] This step sought authority to issue certain securities more than *four* times the size of any previous financing request.[20] Step Three involved the sale of $525 million worth of securities,[21] the largest financing in New Hampshire history.

Based upon the Company's representations, and in particular its *December, 1986* on-line date for Seabrook Unit I, the PUC and the New Hampshire Supreme Court allowed these financings, even though the yields on these securities were as high as 23%.[22]

> "If Seabrook's history has taught us anything, it is that the projections and estimates offered by PSNH officials and witnesses—and frequently relied upon by both the commission and the court—almost always prove to be wrong."[23]

The $70 million "emergency" rate increase requested by PSNH in the case at bar on August 1987, will not restore the Company's financial integrity, it would not have made it solvent, nor would it have allowed the Company to avoid bankruptcy. PSNH needs an increase of $366.6 million, or 77.4%

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[18] *See Appeal of Seacoast Anti-Pollution League (SAPL)*, 126 N.H. 789, 497 A.2d 847 (1985).

[19] *See Appeal of SAPL*, 125 N.H. 465, 482 A.2d 509 (1984); *Appeal of SAPL*, 125 N.H. 708, 490 A.2d 1329 (1984).

[20] *See Appeal of SAPL*, 125 N.H. 465, 466, 482 A.2d 509, 511 (1984).

[21] *See Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 507 A.2d 652 (1986).

[22] *Appeal of CLF*, 127 N.H. at 650, 507 A.2d at 682,(King, C.J. dissenting).

[23] *Appeal of CLF*, 127 N.H. at 649, 507 A.2d at 681, (King, C.J. dissenting).

more than presently allowed New Hampshire jurisdictional revenues simply to service its debt as it presently exists.[24]

PSNH has had since 1979 to challenge N.H. Rev. Stat. Ann. 378:30-a (1984). It did not appeal when the statute was first applied to it,[25] nor has it raised any of the issues presented in this matter in any appeal of a rate case or PUC decision since 1979.[26] The Court should also be aware that after the New Hampshire Supreme Court's decision in the *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46, 480 A.2d 20 (1984), in which the Court first interpreted N.H. Rev. Stat. Ann. 378:30-a (1984), the case was remanded to the PUC. Hearings were held and issues identical to those raised here were actually litigated and administrative remedies exhausted.[27] PSNH then failed to appeal the PUC's denial of a return *on* or *of* its investment in the abandoned Pilgrim II nuclear generating project.

On May 29, 1986, PSNH petitioned for a permanent rate increase of approximately $58.9 million.[28] In addition, the Company requested a $35 million "step increase" for attrition. By Report and Fourteenth Supplemental Order No. 18,726, 72 N.H.P.U.C. ____ (June 29, 1987), the PUC authorized an increase of approximately $20 million and no step increase.[29] It was during the pendency of this rate case that PSNH supposedly lost its "financial integrity." But it did not raise the constitutional issues presented here in that rate case. Indeed, it would have been difficult to argue that a statute is unconstitutional as applied, where in that very same case the Company

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[24] Affidavit of Robert J. Harrison, President PSNH, Exhibit No. 2, Tab 9, page 7, Appendix to Interlocutory Transfer.

[25] *See Re: PSNH*, 64 N.H.P.U.C. 295, 31 P.U.R. 4th 351 (1980).

[26] *Petition of PSNH*, slip opinion at 9.

[27] *Re: PSNH*, 71 N.H.P.U.C. 371 (1986); *Re: PSNH*, 71 N.H.P.U.C. 581 (1986).

[28] *See* N.H. Rev. Stat. Ann. 378:28 (1984).

[29] PSNH's final request to the PUC in that proceeding was for a $38.7 million increase.

actually included in rate base for the first time its prudent and used and useful investment in the Millstone III nuclear generating plant located in Waterford, CT. Millstone III was both *built* and *licensed* under the constraints of the anti-CWIP statute. So the Company decided to file an "emergency" rate case and avoid the facts which would be found by the PUC as to PSNH's overall financial condition in a real case in controversy.

The Company has appealed the June 1987 rate order to the New Hampshire Supreme Court, and the matter is currently awaiting Oral Argument.[30] In that appeal and in this one, PSNH has raised issues relating to the adequacy of the allowed return on equity arguing it was not properly rewarded for the risk to equity occasioned by the anti-CWIPstatute.

On August 5, 1987, while the period for appealing the PUC rate order to the State Supreme Court had not yet expired,[31] PSNH filed this end run around the rate case decision and requested an "emergency" rate increase for $70 million. In its application, PSNH proposed that the PUC allow it a special emergency rate base increment of $464.5 million (27%: of PSNH's total investment of $1.77 billion in Unit I). The Company also proposed that the PUC allow it a special emergency rate of return of 15.28% (the Company's cost of debt capital as determined by the PUC in the just concluded rate case).

Along with the request for an "emergency" rate increase, PSNH asked the PUC to certify two questions to the New Hampshire Supreme Court under N.H. Rev. Stat. Ann. 365:20 (1984).[32] Without notice or an opportunity to be heard, or any

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[30] *Appeal of PSNH*, N.H. Supreme Court, Docket No. 87-334 (appeal docketed Aug. 31, 1987). Date of Oral Argument has not been set.

[31] *See* N.H. Rev. Stat. Ann. 541:6 (1974).

[32] N.H. Rev. Stat. Ann. 365:20 (1984) provides: "The Commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission."

semblance of due process,[33] the PUC transferred the questions to the New Hampshire Supreme Court. Along with the questions, the PUC forwarded certain "facts" contained in affidavits authored by PSNH Officers, and certain Seabrook prudency reports that were sponsored by outside consultants and which the OCA and others had not had an opportunity to cross-examine.[34] Clearly, PSNH hoped to effect the Court's opinion by this material and do so without any interference by the requirements of due process. The factual allegations contained in the interlocutory transfer were not the result of a contested hearing but merely packaged by PSNH and dutifully shipped off to the New Hampshire Supreme Court by the PUC. The OCA's first opportunity to be heard on the "emergency" rate case was at a prehearing conference held by the New Hampshire Supreme Court's Clerk.[35] As a result of that conference, the Court remanded the case to the Commission for findings of facts on issues *it* desired, deferring the issue of whether to," accept the proposed transfer until at a minimum, those issues were addressed.[36]

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[33] *See* N.H. Rev. Stat. Ann. 541-A:14-20 (Supp. 1987). The "essential" minimum standards. *Appeal of Kelleher*, 124 N.H. 274, 279, 469 A.2d 1322, 1325 (1983).

[34] Indeed the OCA had never even seen the Challenge Consultants prudency report. *See Jurisdictional Statement*, Appendix C at 37a-38a, for complete list of reports.

[35] *See Petition of PSNH*, slip opinion at 3. The OCA filed Motions requesting that the Court Refuse the Transfer and for Summary Disposition (N.H. Sup. Ct. R. 25) alleging due process violations in the manner of transfer. U.S. CONST. amend. V and XIV; N.H. CONST., pt.I, art.15. In compliance with the Court's Order Accepting Additional Transfer, Nov. 17, 1987. (*See Jurisdictional Statement*, Appendix I at 77a), the OCA repeated these procedural due process objections in its brief, but they were not addressed by the Court in its final decision.

[36] *See Petition of PSNH*, Order of the Supreme Court Deferring Transfer, September 2, 1987, (*See Jurisdictional Statement*, Appendix D at 43a).

Despite the Court's past refusal to act as PSNH's "super law firm",[37] the Court accepted the transfer from the PUC because it deemed the matter of vital importance to the State. It was clear to all that the Company was preparing to file bankruptcy.

Unfortunately, the PUC has a history of hasty and erratic if not colorable actions where PSNH is concerned.[38] In fact, despite the PUC's certification of these questions to the Court, the PUC then, almost beyond belief, did not wait for the Court to issue an opinion as to whether PSNH was entitled to a hearing, but proceeded to the merits of PSNH's "emergency" rate request anyway. When the PUC was challenged about going forward with a hearing that it had just asked the Court to decide whether it could hold, the PUC explained it could increase rates for PSNH with the use of "non-traditional" ratemaking methods, regardless of what the Court's opinion might be on the Questions originally transferred. Later, recognizing how utterly inconsistent this position was, the PUC finished the hearings, and then asked the Court a third question, i.e. whether it had authority to give PSNH the "non-traditional" relief it had already decided it could give, and had just concluded hearings on.

The Court answered all transferred questions in the negative, and PSNH got what it wanted, an opinion concerning the constitutionality of the laws of the State of New Hampshire. Having treated the New Hampshire Supreme Court as a "super law firm", the Company views this Court no differently, and requests a legal opinion on the value of the "debtor."[39]

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[37] *See Petition of PSNH*, 125 N.H. 595, 598, 484 A.2d 1139, 1141 (1984).

[38] *See Appeal of PSNH*, 122 N.H. 1062, 1074, 454 A.2d 435, 442 (1982); *Appeal of SAPL*, 125 N.H. 465, 482 A.2d 509 (1984).

[39] *See Jurisdictional Statement* at 17, note 15.

ARGUMENT

I. The Appellant's Constitutional Challenges Do Not Present A Substantial Federal Question

A. Appellant Seeks The Judicial Imposition Of A Specific Ratemaking Formula Upon The State Of New Hampshire Contrary To The Decision Of This Court In *FPC v. Hope Natural Gas Co.*

PSNH does not seek to have the Court reaffirm *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944)(*Hope*), but to overturn it and impose on the State of New Hampshire a ratemaking formula more to its liking, i.e. one which guarantees corporate solvency. That policy is to have no policy. It demands the granting of unbridled discretion to the PUC, and denial of power to the Legislature to establish policies and enact statutes prescribing methods to be used in the setting of rates for public utilities. *See Jurisdictional Statement* at 18.

The New Hampshire Court found the anti-CWIP law was completely consistent with *Hope*. While the New Hampshire legislature intentionally left investors with their usual burden to accept the risk of a non-producing plant, the Court found a balancing of interests allowed investors a return commensurate with that risk, as well as a "vested right" to complete projects once started.

PSNH faults the New Hampshire Court's decision on two points that require response. *Jurisdictional Statement* at 19. PSNH obscures the fact that its duty to serve all is precisely what one bargains for in obtaining monopoly status. It is not the onerous duty implied. Secondly, PSNH, in criticizing the New Hampshire Supreme Court, ignores the reality that fi-

nancing for other utilities both now and during the last four years appears to be no problem in New Hampshire.[40]

PSNH refuses to recognize that its financial integrity has also been properly balanced against ratepayers interests by past New Hampshire Supreme Court decisions which find no limits on the amount of financing PSNH can raise regardless of the impact on rates. *Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 507 A.2d 652 (1986). Thus one side of the balancing equation allows PSNH unlimited access to ratepayer revenues, tempered only by what the traffic will bear, *if* Seabrook ever operates. The other side of the equation to this ratepayer exposure is investor exposure, which must likewise be without limit if the plant does not operate.

We have clearly balanced interests in New Hampshire, it is merely the results to which PSNH objects. But if this Court decides to review the matter and determine whether the New Hampshire scheme provides appropriate balancing, the Court should first consider whether it will similarly provide ratepayers a solution to the other side of the "financial integrity" question if it disagrees with the New Hampshire Court. Surely if this Court can determine to what extent a utility's "financial integrity" demands that a plant which may never produce be put into rates, then the Court should reveal how much can be put into rates without the rates becoming "extortionate" pursuant to *Hope*.

PSNH complains it cannot "be compensated for the construction investment" in Seabrook by a return on rate base

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[40] Since the New Hampshire Supreme Court's decision in this matter, other utilities have requested authorization to issue securities. By Order No. 19,060 (April 12, 1988) *Re: Chichester Tel. Co., 73 N.H.P.U.C. (1988), the PUC approved the purchase of Chichester Telephone by Data Systems, Inc. Large infusions of construction capital will be required to bring this sub par system up to a reasonable quality of service. By Order No. 19,062 (April 14, 1988), Re: Dunbarton Tel. Co., 73 N.H.P.U.C. (1988) the PUC* authorized Dunbarton Telephone Company to borrow $630,000 from the Rural Electrification Administration at 7.5% for 35 years. There are numerous other financing requests prior to the Supreme Court's order in this case.

only, when that rate base is but a fraction of the size of its total investment. *Jurisdictional Statement* at 22-23. PSNH at this point purposely confuses the concept of a return on its investments with the concept of compensation for risk. It is true PSNH cannot recover its total capital investment, or earnings thereon, when rate base is significantly smaller, by just enhancing the level of return for additional risk. But at the same time, increasing the rate of return on equity sufficiently to recognize the construction program risk actually perceived by investors is all that is required. An enhanced rate of return is only "meaningless" as PSNH claims, if its expected to recoup failed investments, not reward investors for the risks they assume. The rate of return allowed on PSNH's equity investment has always been appropriate to the risk perceived by its investors. PSNH has never argued otherwise until now.

PSNH argues that the Federal Constitution, and in particular *Hope*, in the name of balancing, gives the PUC more authority over rates than the body from which its power originates. "The prescribing of rates is a legislative act," *Bluefield W.W. & Improv. Co. v. Public Ser. Comm.*, 262 U.S. 679, 683 (1923); N.H. CONST. pt. II, art. 83; *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565, 419 A.2d.1080, 1083 (1980), not an administrative act.

"*Hope*, ... is apposite to the question before us, not for what it holds that the constitution promises, but rather for what it explains that the constitution declines to guarantee." *Petition of PSNH*, slip opinion at 8. "... [R]egulation does not insure that the business shall produce net revenues...." *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). The Federal Constitution is only concerned with the end result of the rate order. *Petition of PSNH*, slip opinion at 8. But the tariff itself in a vacuum tells us nothing. "[T]he focus of inquiry is properly upon the end result or 'total effect' of the rate order, rather than upon the rate-setting method employed." *Pennsylvania Elec. v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 130, 133 (Pa. 1985), *appeal dismissed sub. nom., Metropolitan Edison*

Co. v. Pennsylvania Pub. Util. Comm'n, 106 S. Ct. 2239 (1986). *See Hope*, 320 U.S. at 602.

Therefore, how can this Court consistent with the dictates of *Hope* focus its attention properly upon the end result or total effect of the rate order when PSNH claims the Court does not even have a rate order before it. *See Jurisdictional Statement* at 4, note 2. The Commission controls three variables not one in setting rates: operating expenses, rate base and rate or percentage of return allowed on rate base. *Appeal of PSNH*, 125 N.H. at 49, 480 A.2d at 22. Only in the process where *all three* variables are addressed in the setting of rates can the issues be addressed that will allow the Court to determine whether the end result or total effect of that rate order comports with *Hope*. Without the *three variables* is there any case or controversy to decide?

Alternatively, if this Court decides the New Hampshire Supreme Court's decision below was in fact based on a record which examined *all three* variables, and the record will indeed support this conclusion, then this Court can take the case below because then its opinion will not be advisory.[41] *Petition of PSNH*, slip opinion at 5.

The fixing of prices in intrastate commerce is the exercise of the State's police power. *Munn v. Illinois*, 94 U.S. 113 (1876).

> "The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact value is reduced does not mean that the regulation is invalid." *Hope*, 320 U.S. at 601.

The Federal Constitution does not bind the States to the service of any single formula or a combination of formulas, *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586; *FPC v. Hope Natural Gas Co.*, 320 U.S. at 600; *Permian Basin Area*

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[41] Contrary to PSNH's claim investors were not compensated for the risks assumed, (*See Jurisdictional Statement* at 22), a PUC staff expert testified investors were rewarded for the risk of a nuclear unit. PSNH neither objected to this testimony or rebutted it.

Rate Cases, 390 U.S. 747, 800 (1968), in the setting of rates. The New Hampshire State Constitution does. It sets down principles and guidelines important to the Legislature and the Supreme Court in designing and interpreting a regulatory scheme which protects the property rights of both the investor and consumer. Part II, Article 83 of The State Constitution "... declares our fundamental preference for free enterprise." *Appeal of Omni Communications, Inc.*, 122 N.H. 860, 862, 451 A.2d 1289, 1290 (1982). The Legislature has enacted a statutory scheme of regulation to "...'find a remedy against the evils of monopoly', thus restoring 'healthy competition in the trades and industries.'" *Appeal of Omni Communications, Inc.*, 122 N.H. at 862, 451 A.2d at 1290; JOURN. OF CONST. CONVENTION OF 1902, 579 (1903). "The role and duty of ... [the] commission is to oversee and regulate those few necessary monopolies so that the constitutional rights of free trade and private enterprise are disrupted as little as possible." *Appeal of Omni Communications, Inc.*, 122 N.H. at 862-863, 451 A.2d at 1291. "The statutes which govern the regulation of utilities and which grant the [PUC] its authority provide a surrogate for competition." *Northern Indiana Pub. Serv. Co. v. Citizen's Action Coalition* 485 N.E. 2d 610, 614 (Ind. 1985), *appeal dismissed*, 106 S. Ct. 2239 (1986).

"The majority opinion in the 1944 *Hope Natural Gas Co.* case essentially adopted the theory of legislative hegemony in the sphere of economic regulation expressed in the *Natural Gas Pipeline Co.* concurrence." *Dayton Power & Light Co. v. Public Utilities*, 447 N.E. 2d 733, 740 (Ohio 1983); *In accord, Cleveland Elect. Illum. Co. v. Pub. Util. Comm'n.*,N 447 N.E. 2d 746 (Ohio 1983), *appeal dismissed*, 464 U.S. 802 (1983). The Court does "... not sit as board of revision, but to enforce constitution rights." *Los Angeles Gas Co. v. R.R. Comm'n* 289 U.S. 287, 304 (1932). "The legislature discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislature determination as well as the determination itself. *Id.* at

304. "For protection against [alleged] abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). "In the broad sweep of utility regulation and financing, fundamental changes in risk allocation are policy matters for the legislature rather than constitutional matter for the courts." *Petition of PSNH*, slip opinion at 17.

Hope held that the used and useful principle is no longer constitutionally mandated, but it remains a constitutionally permissible legislative articulation of the perceived interests of consumers. *See Pet. of PSNH*, at 12.

> "The 'used and useful' concept came into existence long before the *Hope* decision was rendered, and it is not generally regarded as having been overridden by that decision." *Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d at 135, *appeal dismissed sub nom., Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm'n.*, 106 S.Ct. 2239 (1986).

It would indeed be curious if the Federal Constitution now prohibits legislative use of ratemaking principles once constitutionally required.

B. The Postponement of Profit Until A State Of Present Use Is Not An Act Of Confiscation But The Exercise Of Legitimate Legislative Discretion

The protection guaranteed by the Federal Constitution relates only to property used and useful in public service. *Denver Stockyard Co. v. U.S.*, 304 U.S. 470, 475 (1937). "Postponement of ... profit until the stage of ... present use is not an act of confiscation, but a legitimate exercise of legislative judgment." *Columbus Gas v. Comm'n.*, 292 U.S. 398, 407 (1934). "The anti-CWIP law, ... protects consumers against the direct consequences of a failed investment and places the onus on the financial markets to assess carefully investment decisions." *Petition of PSNH*, slip opinion at 12.

> "It would be inequitable to prematurely shift the risk of plant failure from the utility's investors to the ratepayers by the inclusion in the rate base of highly

> complex and innovative technology which has not been proven to be reasonably free from significant design or construction defects. The initial risk of failure is appropriately borne by the investors, who have undertaken the project and who will ultimately profit from its success." *Consumers' Council v. Public Util. Comm.*, 391 N.E. 2d 311, 315 (Ohio 1979).

The New Hampshire Supreme Court has rejected the judicial bailout advocated by PSNH.

> "The essence of the company's position in this interlocutory transfer is not ... the company's desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. PSNH seeks rather nothing less than allocation of the risk back to the ratepayers now that the risk of inoperative investment has materialized." *Petition of PSNH*, slip opinion at 10.

The Court, to its credit, has instead followed the traditional free enterprise principles of our founding fathers which requires payment for services rendered rather than services promised.

The Company has more "sticks" in its "bundle of property rights" than any utility operating in any other state. The State of New Hampshire is much more limited in its actions with respect to this Company's property under the State Constitution, then it is under the Federal Constitution. The Company has certain "vested rights" under the New Hampshire Constitution, rights which do not exist under the Federal Constitution. *See Appeal of PSNH*, 122 N.H. 1062, 454 A.2d 435 (1982). The New Hampshire Constitution creates more rights. *See State v. Ball*, 124 N.H. 226, 231-232, 471 A.2d 347, 350 (1983). In the area of public utility regulation, the State Constitution prohibits the PUC from telling a utility how to manage its affairs. Although the State imposes upon PSNH the obligation to serve (N.H. Rev. Stat. Ann. 374:1) in exchange for its monopoly status, (*See Jersey Cent. Power & Light Co. v. FERC*, 810 F. 2d 1168, 1190 (D.C. Cir. 1987), Starr, J., concur-

ring), the PUC does not have the authority to tell PSNH precisely how it is to fulfill this obligation and may only review the prudency of its actions when recovery from ratepayers is sought. "Furthermore, a public utility is not bound to supply consumer energy needs beyond its financial capacity to do so." *Appeal of Legislative Utility Consumers Council (LUCC)*, 120 N.H. 173, 175, 412 A.2d 738, 739 (1980).

In 1982 the PUC, convinced that PSNH was headed for financial failure, attached conditions to a PSNH financing. The PUC, in effect, ordered the Company not to expend funds on Seabrook Unit II until it divested itself of part of its ownership interest in the Seabrook project so that it owned no more than 28%, got the other Joint Owners to help alleviate its financial condition or Seabrook Unit I was completed. *Appeal of PSNH* 122 N.H. at 1065, 454 A.2d at 436-437. PSNH appealed and maintained, in effect, "... not only that it has the right to complete the project with its own funds, but also that it has the right to issue any securities that it believes are necessary to finance the project." *Appeal of PSNH*, 122 N.H. at 1078, 454 A.2d at 444-445, (King, C.J., dissenting). The majority agreed.

The New Hampshire Supreme Court held "[b]e it one unit or two, our constitution is explicit that 'no part of a man's property shall be taken from him' without due process and compensation" N.H. CONST. pt. I, art. 12; *Appeal of PSNH*, 122 N.H. at 1070, 454 A.2d at 440. After the State approved PSNH's initial proposal for the Seabrook project,[12] it acquired a "vested right" to complete the project, regardless of the PUC's belief that changing conditions dictated a change in course. *Id.* 122 N.H. at 1069-1070, 454 A.2d at 439. "The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is

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[12] *See Society For Protection of N.H. Forests v. Site Evaluation Committee*, 115 N.H. 163, 337 A.2d 778 (1975); N.H. Rev. Stat. Ann. chapter 162-F (1977); *Appeal of PSNH*, 122 N.H. at 1067-1069, 454 A.2d at 438-439.

economically wise to what is legally permissible." *Hope*, 320 U.S. at 652, (Jackson, J., concurring).

Nonetheless, "[a] vested right to build is not a vested right to have customers pay," now that the risk of an inoperative plant has materialized. *Appeal of PSNH*, 122 N.H. at 1076, 454 A.2d at 443.

New Hampshire has decided not to abandon the principle of used and useful in the nuclear age, especially when its utilities have certain "vested rights" and Federal licensing procedures do not guarantee that a nuclear plant that is built will ever enter commercial operation. Investors are now, and have been for decades, on notice that all their funds may go for naught. *Power Reactor Co. v. Electricians.*, 367 U.S. 396, 415 (1961). In view of the Federal licensing scheme, the New Hampshire legislature has wisely decided that this risk of loss is upon investors until the necessary licenses are obtained and the plant is providing service to customers. N.H. Rev. Stat. Ann. 378:30-a (1984). PSNH, "[w]ith its eyes open, ... has willingly accepted that risk, however great." *Power Reactor Co. v. Electricians.*, 367 U.S. at 415.

II. The Arguments Raised In This Case Are Wholly Without Merit

A. Appellant Is Not Entitled To Return Based On What Risks Are Now

"[N]uclear power, the national pride and goal of the early 1970's," (*Jurisdictional Statement* at 16), has now proven to be the boondoggle of the 1980's. Seabrook power, once heralded as "Too Cheap To Meter", is going to be too expensive to bill if and when PSNH ever gets Seabrook into commercial operation. The promise of the 1970's is a costly lesson in the ageless adage that one should never put all of one's eggs in a single basket.

This is not a situation in which we are dealing with prudently abandoned plant.[43]

> "At a time when other utility companies determined ... that market forces required them to abandon future construction of nuclear generating plants already under construction, PSNH in the face of an unchallenged anti-CWIP statute determined to proceed with construction. The risk of doing so was measured and calculated closely by the marketplace and investors and was reflected in the interest rates charged on the company's bonds and notes and the market prices of its equity shares. The risk of failure was present in this enterprise as with any other business venture and was available for assessment by those who lent money and those who bought shares." *Petition of PSNH*, slip opinion at 11-12.

PSNH's statement "... that no investor, with foreknowledge of what some state courts now say is the extent of their rights, would ever risk capital in an anti-CWIP state," flies in the face of reality. *See Jurisdictional Statement* at 19. New Hampshire's used and useful policy did not first appear with the enactment of the anti-CWIP statute. *See New England Tel. Co. v. State*, 95 N.H. 353, 366, 64 A.2d 9, 19 (1949).

Investors have been more than willing to gamble if the return is high enough. Step Three in the 1984 Newbrook plan, the "... sale of $525 million in Third Mortgage deferred interest bonds and pollution control revenue bonds involves a two-year capitalization of interest at a 23% rate." *Appeal of CLF*,

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[43] PSNH's contention that its situation is like that of the *Duquesne* case, (*See Duquesne Light Co. v. Barasch*, Docket No. 87-1160) in which the Court noted probable jurisdiction, is spurious. The Appellants in that case allege that the Pennsylvania Supreme Court did not recognize any obligation to balance consumer and investor interests and did not even mention *Hope*. The New Hampshire Supreme Court relies on and extensively cites *Hope*. It specifically addresses the issue of balancing and finds that the New Hampshire regulatory scheme balances the interests in accordance with *Hope*. *See Petition of PSNH*, slip opinion at 8-12.

127 N.H. 650, 507 A.2dL at 682, (King C.J., dissenting). The Company has never been short of speculators willing to invest in it, despite its failure to have investment grade securities since 1979.[11]

> "Any vested right which the company had when it commenced construction was a right to the constitutional guarantees of *Hope;* namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary." *Petition of PSNH,* slip opinion at 13.

PSNH claims the New Hampshire Court's finding that it has been given an adequate return is pure dictum, basing its argument on the allegation the Court miscited a 1980 PUC Order. *Jurisdictional Statement* at 20-22. Therefore, in PSNH's view the PUC never allowed it "any return" on construction investment. In truth the PUC has found without any equivocation that PSNH's revenues include a partial recovery of its construction capital costs. In fact the matter is addressed at some length by the PUC when it notes the effect on rate of return using total Company capital, stating the Seabrook project

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[11] The Company lost its "B" bond rating in 1979. Securities rated at B or below lack the characteristics of a desirable investment.

> "... has a direct effect upon rates through the recovery of capital costs in the rate of return component of the rate formula." *Re: PSNH, 69* N.H.P.U.C. 67, 84 (1984).

What PSNH construes as a miscitation is actually recognition by the Court that in the very first case after the anti-CWIP law, the PUC intentionally used "the costs rates of all equity and debt issues" including Seabrook in calculating an overall rate of return, thereby increasing the profit otherwise allowed. *Re: PSNH*, 65 N.H.P.U.C. 45, 53 (1980), *See Jurisdictional Statement*, Appendix J at 92a. Nor can there be any question the New Hampshire Court understands the impact on revenues which results from using total capital versus capital represented by rate base alone. *Appeal of PSNH*, 125 N.H. 46 (1984).

Nonetheless, the New Hampshire Supreme Court's first interpretation of the anti-CWIP statute does not address the proper return on equity. The concern in that opinion[45] was "... only with the basic analysis necessary for an understanding of how the statute, [N.H. Rev. Stat. Ann. 378:30-a], operates." *Appeal of PSNH*, 125 N.H. at 49, 480 A.2d at 22.

> "We cannot determine on the present record however, the extent, if any, to which the lost investment may justify an increase in the rate of return for the purpose of attracting new capital. It is easy to argue that any increase in the rate of return will allow at least partial recovery of lost investment. But it does not follow from this alone that the statute precludes such a result if it is necessary to attract such investment as the commission may find to be required in the future. We will not attempt in the abstract to draw the line between an increase in rate of return that produces an indirect and impermissible recovery on the one hand and one that is arguably neces-

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[45] This case involved the transfer of questions by the PUC to the Court pursuant to N.H. Rev. Stat. Ann. 365:20 (1984) as well.

sary to attract investment essential to future operations on the other." *Id.*, 125 N.H. at 55, 480 A.2d at 26.

B. The Return To Which PSNH Is Entitled

PSNH is not entitled to have its rate of return increased to the point where it is "... producing the same revenue over the same period of time that might be produced if the investment were amortized as an expense." *Appeal of PSNH*, 125 N.H. at 55, 480 A.2d at 26. Nor does it have a "... constitutional right to profits as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield W.W. Improv. Co. v. PSC*, 262 U.S. at 692-693. It is entitled to a return "... commensurate with returns on investments in other enterprises having corresponding risks ... moreover, [the return] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Hope*, 320 U.S. at 603.

PSNH is entitled to "... *not less* than a *reasonable return* on the cost of the property of the utility *used* and *useful* in public service." N.H. Rev. Stat. Ann. 378:27. (emphasis added).

"... [T]he *return must equal the cost of capital* represented by the rate base, that is, by the value of the Company's *used and useful property.*" *Appeal of Cheshire Bridge Corp.*, 126 N.H. 425, 431, 493 A.2d 1151, 1156 (1985). (emphasis supplied) "Once determined, it marks the *minimum* rate of return to which the company is lawfully entitled." *New England Tel. Co. v. State*, 95 N.H. 353, 361, 64 A.2d 9, 16 (1949); *New England Tel. Co. v. State*, 104 N.H. 229, 232, 183 A.2d 237, 240 (1962). (emphasis supplied) "However, in accordance with the statutory directive that rates be 'just and reasonable' (N.H. Rev. Stat. Ann. 378:7, :27,28), the Commission in the exercise of its judgement on the evidence before it can allow a rate of return in excess of the cost of capital." *New Eng. Tel. Co. v. State*, 104 N.H. at 232, 183 A.2d at 240; *Appeal of Cheshire Bridge Corp.*, 126 N.H. at 425, 493 A.2d at 1157. The New Hampshire Court recognizes the PUC has done so. *Petition of PSNH*, slip opinion at 9.

"[T]he rate of return to which the investor is entitled is measured in part by the risks of the business as compared with those of comparable enterprises." *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951). The constitutional consequence of N.H. Rev. Stat. Ann. 378:30-a (1984) "... is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them." *Petition of PSNH*, slip opinion at 9. The New Hampshire Supreme Court has found that in the past, the PUC has applied the proper analysis to the Company's rate of return to reflect the additional risks created by the anti-CWIP statute. *Id.* at 9. Apparently PSNH agreed because it never appealed from the prior PUC decisions they now refer to. The issue of whether the Company has received compensation for this risk in its *current rates* is also before the New Hampshire Supreme Court. *Appeal of PSNH*, New Hampshire Supreme Court Docket No. 87-334, (appeal docketed August 31, 1987).

If the New Hampshire Supreme Court decides that PSNH has received the return it is entitled to, "... then the investor would be paid for the occurrence of the very eventuality the risk of which he had been consciously carrying and for which he had already been paid." *Washington Gas Light Co. v. Baker*, 188 F.2d at 20.

To, after paying investors for the risk that assets may never produce, place those non-producing assets in rate base as well, has the same effect upon the consumer "... as if an insured person were required to assume the loss against which he believed himself protected by the payment of premiums." *Id.* at 20. The end result of this rate order would clearly violate the consumer interest against "exorbitant" rates. *Id.* at 20. "With or without anti-CWIP the State and Federal Constitution do not allow the Company to have it both ways." *Petition of PSNH*, slip opinion at 10. "Ratepayers cannot be required both to carry this risk and to pay the Company for carrying it." *Washington Gas Light Co. v. Baker*, 188 F.2d at 20.

The end result of New Hampshire's regulatory scheme is similar to that of Ohio. This Court has approved this manner of compensation. *See Cleveland Elec. v. Public Util. Comm.*, 447 N.E. 2d 746 (Ohio 1983), *appeal dismissed*, 464 U.S. 802 (1983); *Dayton Power & Light Co. v. Pub. Util. Comm'n.*, 447 N.E. 2d 733 (Ohio 1983); *Consumer's Counsel v. Pub. Util. Comm'n. of Ohio*, 447 N.E. 2d 749 (Ohio 1983); *See also Toledo Edison Co. v. Pub. Util. Comm'n.* 447 N.E. 886 (Ohio 1984); *See* also generally, Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. 65 (1985).

The fact that some may allow more is irrelevant. "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

III. Appellant Has Not Timely Or Properly Raised The Federal Issues

PSNH has had since 1979 to challenge the anti-CWIP statute. It has had numerous rate cases in which to do so. A decision in the Company's favor will not change the situation in which it finds itself.

Hope's investor interests are "... inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in." *Market Street R. Co. v. Comm'n*, 324 U.S. 548, 566 (1945).

> "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces. *Id.* at 567.

"Providing a return sufficient to maintain the financial integrity of a sound company is one thing; restoring the financial integrity is another." *Petition of PSNH*, slip opinion at 10.

CONCLUSION

PSNH's "lack of financial integrity" does not flow from policies enacted in Concord, New Hampshire but from those enacted in Washington, D.C. Federal nuclear policy not State ratemaking formulas are to blame. It was not PSNH's residential utility consumers who picked Seabrook as the site of this Company's first foray into the field of nuclear energy. There is no legal justification for requiring consumers to bailout a utility that has arguably placed a multibillion dollar nuclear generator in the wrong place and which has been generously paid for risks that were freely accepted. PSNH has already had its *Hope* hearing on its present rates, which is now on appeal to the New Hampshire Supreme Court. The "emergency" case was a second *Hope* hearing on these same rates. This appeal presents no substantial federal question that has not been fully answered many times in the past by this Court.

Respectfully submitted,

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Dated: May 13, 1988

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NO. 87-1613

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court
Of New Hampshire

CERTIFICATE OF SERVICE

I, Michael W. Holmes, a member of the Bar of this Court, hereby certify that on the 13th day of May, 1988, three copies of the Motion of Appellee, Michael W. Holmes, Consumer Advocate, To Dismiss or Affirm, in the above entitled case were mailed, first class postage prepaid, to Thomas R. Jones, Esq., Attorney for Appellant, 80 Pine Street, New York, New York, 10005, Larry M. Smuckler, Esq., Assistant Attorney General, Attorney for the State of New Hampshire, State House Annex, 25 Capitol Street, Concord, New Hampshire, 03301, Robert C. Hinkley, Esq., Attorney for Campaign for Ratepayer's Rights, 1838 Elm Street, Manchester, New Hampshire, 03104.

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MAY 13 1988

(5)

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IN THE

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OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

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IN THE

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OCTOBER TERM, 1987

No. 87-1613

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Official Committee of Unsecured Creditors (the "Unsecured Creditors' Committee") of Public Service Company of New Hampshire ("PSNH"), appointed on February 10, 1988 in the bankruptcy reorganization proceeding of PSNH, respectfully moves for leave to file the annexed brief *amicus curiae* in support of the Jurisdictional Statement of Appellant PSNH. The attorneys for PSNH and appellee the State of New Hampshire have consented to the filing of the brief; the consents of the attorneys for the other appellees, the Consumer Advocate and the Campaign for Ratepayers' Rights, were requested and denied.

This appeal involves an attempt by a state legislature to restrict a rate-making authority from setting utility rates in the manner prescribed by this Court. The statute at issue precludes

consideration of the cost or value of generating facilities which have been built but which are not in service even where, as here, the facility is inoperative only because licensing has not yet been obtained and the failure to include these assets in the rate base has catastrophic financial consequences.

The Unsecured Creditors' Committee was appointed to represent all of the unsecured creditors of PSNH, including trade creditors and institutional and individual debt holders. At present its members represent some $900 million in unsecured debt. The Unsecured Creditors Committee requests leave to submit this brief *amicus curiae* because the issue before this Court is one of national significance and because resolution of the issue in this case will have a significant impact on the ability of the unsecured creditors to realize on their claims in the PSNH reorganization case.

Respectfully submitted,

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May 16, 1988

QUESTION PRESENTED

Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application of that statute to deny utility investors any recovery of or on investment in a generating plant which is fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?

PARTIES TO THE PROCEEDING

The petitioner below was Public Service Company of New Hampshire. The State of New Hampshire was the respondent below. The Consumer Advocate, Michael W. Holmes, and the Campaign for Ratepayers' Rights were intervenors in the New Hampshire Supreme Court.

Rule 28.1 Listing

Amicus, The Official Committee of Unsecured Creditors of Public Service Company of New Hampshire, is an official committee appointed on February 10, 1988 in the reorganization of Public Service Company of New Hampshire under Chapter 11 of the Bankruptcy Code. The Official Committee of Unsecured Creditors has no parent company, subsidiaries or affiliates. Its members and *ex officio* member are as follows:

Equitable Capital Management Corp.
Hemphill Power & Light Co.
IBJ Schroder Bank & Trust Company
Integon Life Insurance Corporation
Midlantic National Bank
New Hampshire Hydro Association
United Engineers & Constructors, Inc.
State Street Bank and Trust Co. (*ex officio* member)

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IN THE

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No. 87-1613

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF AMICUS CURIAE OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANT

INTEREST OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AS AMICUS

The Official Committee of Unsecured Creditors (the "Unsecured Creditors' Committee" or the "Committee") of Public Service Company of New Hampshire ("PSNH") was appointed on February 10, 1988 to represent all unsecured creditors of PSNH in connection with a voluntary petition for reorganization filed by PSNH on January 28, 1988 under Chapter 11 of the Bankruptcy Code. The Unsecured Creditors' Committee represents the owners of the entire spectrum of unsecured debt, including trade creditors, debenture holders and indenture trustees. Committee members in the latter two

categories consist of or represent institutional investors such as pension and trust funds, as well as individual investors. The total amount of unsecured debt presently represented by members of the Unsecured Creditors' Committee is approximately $900 million.

In the decision from which this appeal is taken, the Supreme Court of New Hampshire held that New Hampshire Rev. Stat. Ann. § 378:30-a (1984), the so-called "anti-CWIP" statute, precluded the New Hampshire Public Utilities Commission (the "PUC") from granting PSNH an emergency rate increase, even though PSNH was on the brink of financial collapse. The court rejected PSNH's contention that, by erecting an absolute barrier to the PUC's consideration of all matters relevant to PSNH's financial condition, the New Hampshire Legislature had run afoul of this Court's mandate that utility rates be "just and reasonable." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

The bankruptcy petition filed by PSNH was the inevitable and immediate result of the failure of the PUC to grant the requested emergency rate increase. Although it is now too late to avoid these consequences, the Unsecured Creditors' Committee supports the position of PSNH on this appeal because the Committee believes that a review of PSNH's emergency rate increase application without the strictures of the anti-CWIP statute would result in significant increased revenue to PSNH. From the perspective of the unsecured creditors, this infusion of income could mean a substantial difference between a successful reorganization and one in which unsecured debt may be materially and adversely affected.

STATEMENT OF THE CASE

The Unsecured Creditors' Committee adopts the full Statement of the Case in the brief filed by PSNH. The principal factual points contained in PSNH's brief are these:

1. PSNH undertook construction of the Seabrook Nuclear Generating Station in 1974, with the full support of the PUC.

The planning and construction of this project was no doubt the product of the widely prevalent belief in the early 1970's that demand for electricity would soar and that, in view of the Arab oil embargo, nuclear plants would be less expensive to build and operate than alternate energy sources. *See* Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity*, 132 U. Pa. L. Rev. 497, 500-02 (1984).

2. Construction of the Seabrook project was approved at various stages by the Federal Nuclear Regulatory Commission and supported by the New Hampshire Legislature. Although Unit One of Seabrook Station was completed in October 1986, it has not been placed into service, primarily because of opposition of anti-nuclear groups.

3. As of July, 1987, PSNH, which owns 35.6 per cent of Seabrook, had invested approximately $2 billion in the project, which amounts to some 69 per cent of its assets. Since 1979, PSNH has been unable to include any of this amount in its rate base. In that year, the New Hampshire Legislature enacted the so-called anti-CWIP statute, which provides that rates for utilities "shall not in any manner be based on the cost of construction work in progress" and that such costs "shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers."

4. In the spring of 1987, after years of difficulty raising capital, PSNH found itself unable to market an issue of its notes. As part of a plan to enable its continued survival, PSNH sought an emergency rate increase from the PUC. Although the PUC did not dispute PSNH's position that the company would not be able to meet its obligations without an emergency rate increase, the PUC found that the only way in which it could grant the application was to take into account the value or cost of the Seabrook facility, which it was prohibited from doing under the anti-CWIP statute.

5. The PUC certified to the Supreme Court of New Hampshire the legal question whether, in light of these facts, PSNH

was entitled to a hearing "to establish a level of rates to restore its financial integrity consistent with the interests of customers . . . notwithstanding the so-called anti-CWIP statute." The Court found that a hearing was not required and that the anti-CWIP statute could constitutionally be applied to the facts presented here. On remand, the PUC denied PSNH's application for an emergency rate increase and dismissed the petition.

ARGUMENT

In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), this Court held that to satisfy constitutional requirements, utility rates must be set at a "just and reasonable" level, which in turn requires a "balancing of the investor and the consumer interests." *Id.* at 603. From the investors' perspective, the rates established must provide sufficient revenue for operating and capital costs, a return which is "sufficient to assure confidence in the financial integrity of the enterprise so as to maintain its credit and to attract capital." *Id.*

The decision from which this appeal is taken ignored those principles. Instead, the state court reached the conclusion that a legislative body is entitled to handcuff a rate-making authority by preventing it from considering in any manner the value or cost of assets not yet placed in service, even where the result is a bankruptcy proceeding, the ultimate loss of financial integrity. This appeal thus clearly presents a substantial constitutional question. Indeed, unless the judgment of the New Hampshire Legislature is allowed to supersede the constitutional pronouncements of this Court, a reversal on the merits should surely result.

The Development of the Constitutional Standard of "Just and Reasonable" Rates

More than one hundred years ago, this Court described the "regulatory compact" governing the fixing of utility rates. *The Railroad Commission Cases*, 116 U.S. 307, 343-45 (1886) (dissenting opinion). Investors in regulated utilities yield the power to reap free market profits and agree to provide service to all

customers; in return, they are guaranteed a reasonable rate of return.

Prior to this Court's decision in *Hope*, the courts, following the lead of this Court in *Smyth v. Ames*, 169 U.S. 466 (1898), focused their review of rate-making decisions on whether or not the rate-making authorities had correctly established the "fair value" of the assets of the company. As a corollary to that principle, the courts only permitted assets to be included in the utility's rate base if they were "used and useful," that is, actually servicing the utility's customers. *See* discussion in *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987).

In *Hope*, this Court construed statutory provisions relating to natural gas which, in themselves are not directly relevant here. But the Court's decision was not merely an exercise in statutory interpretation. Because prior decisions had equated the statutory standard with that mandated by the Constitution, the decision in *Hope* "defines the point at which a rate becomes unconstitutionally confiscatory as well." *Jersey Central*, 810 F.2d at 1175.

In *Hope*, the utility claimed that the rate-making authority, the Federal Power Commission, erred in using original rather than replacement cost of its assets in computing the rate base. The Court found that the method employed by the rate-making authority in assessing the fair value of the utility's assets was irrelevant. In marked departure from the prior analysis, the Court held that what was required was that the end result be, in the words of the statute, "just and reasonable." The fixing of "just and reasonable" rates, according to the Court, required "a balancing of the investor and the consumer interests." 320 U.S. at 603. Speaking through Justice Douglas, the Court articulated the factors to be considered in evaluating the investors' interests this way:

> [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for oper-

> ating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id. (citations omitted).

This change in the nature of the judicial inquiry—eliminating the focus on methodology and replacing it with a concern for the end result—also impacted on the concept of including only "used and useful" assets in the rate base. As explained in the *Jersey Central* case, "with the demise of 'fair value,' 'used and useful' ceased to have any constitutional significance . . . . It is now simply one of several permissible tools of ratemaking, one that need not be, and is not, employed in every instance." 810 F.2d at 1175 (citations omitted).

The principles set forth in the *Hope* case have been followed by this Court in subsequent opinions. For example, in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Court held that compliance with constitutional requirements required the courts to consider "whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." *Id.* at 792.

The PUC's Order and the New Hampshire Court's Decision Clearly Fail to Comport with the *Hope* Standard

In this case, as recited in the opinion of the New Hampshire Supreme Court, the PUC found that it was "unlikely that PSNH would be in a position to meet its cash obligations as they became due: namely, interest and principal payments on

debts, expansion of service to customers, and fuel expenses, payroll, and other related expenses." The PUC also found, as expressed by the New Hampshire court, that "financial markets are unwilling to provide additional new funds for PSNH due to investor perceptions of high risk." (4a-5a).[1]

The PUC found that the only other available source of funds, and the only "realistic alternative" (5a) was obtaining additional cash through a rate increase. Specifically, the PUC found that "PSNH needs additional revenues from a rate increase in order to meet its cash obligations" (6a), which as a practical matter is the minimum level of financial integrity of any business organization.

In short, the rate-making authority in this case determined that proper consideration of investor interests, as defined in the *Hope* case, required consideration of the merits of PSNH's application for an emergency rate increase. But no such analysis was undertaken because the basis for the request related to the costs associated with Seabrook Unit One and the court had advised the PUC that no such costs could be taken into account.[2] Thus, the PUC rejected the rate increase application without even engaging in the process of balancing investor and consumer interests, as mandated by this Court in *Hope*.

The issue thus squarely presents itself: Is the policy making judgment of a state legislature in enacting a nonconstitutionally mandated *per se* rule against including certain assets in a utility's rate base to be allowed precedence over this Court's articulation of the balancing process that must be undertaken to avoid imposition of constitutionally infirm confiscatory rates?

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1 References are to pages of the opinion annexed as Appendix A to PSNH's Jurisdictional Statement.

2 The court suggested that investors had already been compensated for the risk that no return would ever be permitted on nearly 70 per cent of the company's assets. For the reasons stated by PSNH, the Court's position is without basis. PSNH Jurisdictional Statement at pp. 20-25.

That this issue is one which raises a substantial constitutional question is scarcely debatable.[3]

The New Hampshire Anti-CWIP Statute Is Unconstitutional

The Unsecured Creditors' Committee believes that when the Court reaches the substantial question raised by this appeal, it will hold the New Hampshire anti-CWIP statute unconstitutional. The analysis employed in the majority opinion of the D.C. Circuit in *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987) is directly on point, completely persuasive and, if accepted, determinative of the issues raised on this appeal.

In *Jersey Central*, the utility sought rate increases from the Federal Energy Regulatory Commission (the "Commission") based on inclusion in rate base of a portion of the costs of constructing the Forked River nuclear power plant, a facility that had been cancelled by the utility before it was completed. The Commission had summarily dismissed the application without affording a hearing on the ground that prior Commission precedent precluded consideration of any costs for assets not placed into actual service. In a concession that would be dispositive here, but was not in *Jersey Central*, the Commission contended that the court could only set aside a rate order under *Hope* "if the [rate] order would put the utility into bankruptcy." *Id.* at 1175.

After reviewing this Court's decisions, the court found that the Commission had misstated the law and that the Commission's *per se* exclusion of the cost or value of the cancelled nuclear facility violated the principle established in *Hope*. The

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3 Given this Court's recent notation of probable jurisdiction in *Duquesne Light Co. v. Barasch*, 108 S. Ct. 1105 (1988), a similar result in this case would appear to be an *a fortiori* conclusion. In *Duquesne*, the record before the Court does not suggest that Pennsylvania's anti-CWIP statute placed the utilities in financial jeopardy. It is thus conceivable, though not urged by the Committee, that the Court in *Duquesne* could decide that Pennsylvania's anti-CWIP statute is not unconstitutional on its face, though the New Hampshire statute challenged here is invalid as applied to a utility, such as PSNH, on the verge of insolvency.

court noted that *Hope* requires a balancing of investor interests "in maintaining access to capital markets, the ability to pay dividends, and general financial integrity." Noting that "companies about to go bankrupt would certainly see such interests threatened," the court found that "companies less imminently imperiled will sometimes be able to make that claim as well." *Id.* at 1180.

The court held that, in achieving a proper balance between those investor interests, on the one hand, and the consumer interest in the non-imposition of exploitative rates, on the other, a rate-making agency must analyze all relevant factors, including the cost of prudent investments not placed into service.[4] A rule which precludes consideration of these components without regard to the financial consequences of such a refusal—whether imposed by an agency's prior precedent or by state statute—cannot be squared with the rule established by this Court in *Hope*:

> The central point, however, is this: it is impossible for us to say at this juncture whether including the unamortized portion of Forked River in the rate base would exploit consumers *in this case*, or whether its exclusion, *on the facts of this case*, constitutes confiscation, for no findings of fact have been made concerning the consequences of the rate order. . . . Jersey Central has presented allegations which, if true, suggest that the rate order almost certainly does not meet the requirements of *Hope Natural Gas*, for the company has been shut off from long-term capital, is wholly dependent for short-term capital on a revolving credit arrangement that can be cancelled at any time, and has been unable to pay dividends for four years.

---

4 In this case, there has been no decision as to whether or not the costs of Seabrook Unit One were prudently incurred, since the anti-CWIP statute precluded the PUC from ever reaching that question. Although the Unsecured Creditors' Committee believes that the investment will be shown to have been prudent when made and fully supported by legislative and regulatory authorities in New Hampshire, the issue is simply not before the Court on this appeal.

Jersey Central, 810 F.2d at 1181 (emphasis in original) (footnote omitted).

All of this applies with even greater force here, where the facility sought to be included has been completed, not cancelled and where the condition which the Commission conceded would justify judicial intervention in *Jersey Central*—the bankruptcy of the utility—has in fact occurred.

CONCLUSION

The constitutional question presented by this appeal is a substantial one; indeed, when the merits are reached, the Court is likely to reverse the decision of the New Hampshire Supreme Court. The Official Committee of Unsecured Creditors of Public Service of New Hampshire respectfully requests that this Court note probable jurisdiction of this appeal.

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OBJECTION OF APPELLEE, MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND RESPONSE TO BRIEF AMICUS CURIAE OF THE EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

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TABLE OF AUTHORITIES

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Appellee

On Appeal From The Supreme Court of New Hampshire

OBJECTION OF APPELLEE, MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND RESPONSE TO BRIEF AMICUS CURIAE OF THE EQUITY SECURITY HOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Now comes Appellee, Michael W. Holmes, Consumer Advocate (hereinafter the Office of

the Consumer Advocate or OCA)[1] and pursuant to Supreme Court Rule 36.3 objects to the Motion For Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Committee of Equity Security Holders of Public Service Company of New Hampshire (the Equity Committee) and in support thereof says:

1. The Motion of the Equity Committee fails to "... set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case

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[1] The OCA is an agency of the State of New Hampshire authorized to represent the interests of New Hampshire residential utility consumers before the New Hampshire Public Utilities Commission and any state or federal agency or court in which the interests of the residential utility consumers are involved. N.H. Rev. Stat. Ann. 363:28 (Supp. 1987). Appellee, Michael W. Holmes, has served as the Consumer Advocate of New Hampshire since 1983.

...." Sup. Ct. R. 36.3.

2. On January 28, 1988, Public Service Company of New Hampshire (PSNH or Company) sought protection from its creditors under Chapter 11 of the United States Bankruptcy Code (See Case No. 88-00043, U.S. Bankruptcy Court for the District of New Hampshire). No trustee has been appointed pursuant to 11 U.S.C. section 1104. The management appointed by the members of the Equity Committee is still operating the Company, and counsel hired by them prepetition are still representing the Company post petition.

3. The arguments of the Equity Committee are the same as those of Counsel of Record for the Company and its interests are adequately protected by him. Should the

Equity Committee believe differently, then they should take appropriate action in the United States Bankruptcy Court. The OCA, in accordance with Justice Brennan's order of April 22, 1988, will file a Motion to Dismiss on or before May 16, 1988, which will address the arguments of the Equity Committee and Counsel of Record in greater detail.

4. "The essence of the [Equity Committee's] position in this interlocutory transfer is not, ... the [Committee's] desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. [The Committee] seeks, rather nothing less than allocation of the risk back to ratepayers now that the risk of inoperative investment has materialized." Petition of Pub. Serv. Co. of N.H., 130 N.H. ___, ___ A. 2d ___ (January 26, 1988), slip opinion at 10.

> "That is, failure to recover the cost of a completed but non-functioning plant is one of the risks that a higher rate of return compensates the investors for bearing. That risk has materialized; and now by asking that CWIP be included in rate base the Company is asking to shift the risk back to the ratepayer. The Company and its investors have received compensation for the risks they have assumed through an enhanced rate of return, and here seek relief from those risks now that they have come to pass. Essentially, the Company seeks a bailout. With or without anti-CWIP, the State and Federal Constitution do not allow the Company to have it both ways." Id. at 10.

"Ratepayers cannot be required both to carry this risk and pay the Company for carrying it" Washington Gas Light Co. v. Baker, 188 F. 2d 11 (D.C. Cir. 1950), cert denied, 340 U.S. 952 (1951).

5. If a non-regulated company embarked on a new capital project to build a factory that would produce a new sports car, the automobile company, in a competitive market, would ordinarily be unable to force its customers to pay for cars never delivered. N.H. Rev. Stat. Ann. 378:30-a (1984) (anti-CWIP statute) "... protects consumers from having to pay for service not received, something which they would not be subjected to in a competitive industry." Northern Indiana Pub. Serv. Co. v. Citizen's Action Coalition, 485 N.E. 2d 610, 615 (Ind. 1985), appeal dismissed, 106 Sup. Ct. 2239 (1986). The Constitution no longer provides any special protection for the utility investor. Dayton Power & Light Co. v. Pub. Util. Comm'n, 447 N.E. 2d 733, 740 (Ohio 1983). In accord, Cleveland Elect. Ill. Co.

v. Pub. Util. Comm'n, 447 N.E. 2d 746 (Ohio 1983) appeal dismissed, 464 U.S. 802 (1983). The residential ratepayers of PSNH are not required to bailout the equity holders of the Company any more than the State is required to bailout the investors in a non-regulated company. Risk of loss and financial failure is upon the investors of PSNH to the same degree as in private enterprise.

6. Should the Court overturn the anti-CWIP statute, the PUC not the Legislature would then have discretion to award rates based on CWIP after it lowers the Company's rate of return. In order for the members of the Equity Committee not be "wiped out", the Court must not only declare N.H. Rev. Stat. Ann. 378:30-a (1984) unconstitutional, but order that ratepayers pay and keep on paying

for Seabrook without limitation. Will the 350,000 PSNH customers find any relief in the United States Bankruptcy Court? How can the equity holders expect a State with less than one million people to pay the over $2 billion invested in Seabrook, and to also bear the cost of power that will have to be purchased to replace that which was to be supplied by Seabrook. It was the equity holders who liquidated the Company to complete Seabrook. It was they who decided to issue securities with yields of 23%. See Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986). It was the Equity Committee that took full advantage of the New Hampshire State Constitution's blank check privileges with respect to utility financing. See Appeal of Pub. Serv. Co. of N.H., 122 N.H. 1062, 454 A.2d 435 (1982). It should be the Equity Committee that bears

the loss for their own decisions. To do otherwise is to render the Federal Constitution's protection of consumers from "exploitative" rates meaningless. To focus on this Company's self-inflicted financial condition is not consideration of the "end result" of a rate order, if that financial condition is the result of a process which balances the interests of consumers and investors. The anti-CWIP statute is the quid pro quo for the "vested" right to build. See Appeal of Pub. Serv. Co. of N.H., supra. If PSNH obtains a commercial operating license for Seabrook, it will be legally entitled to charge consumers for every penny prudently spent on that plant, regardless of how high rates may become and the resulting economic consequences to its customers.

7. PSNH has such a large investment in Seabrook (three times total non-Seabrook assets) that the Court's decision in FPC v. Hope Gas Co., 320 U.S. 591 (1944) will enable it to charge whatever the traffic will bear. The only impediment is that it must get this highly complex and innovative technology to work according to the regulations of the Nuclear Regulatory Commission. From the residential utility consumers viewpoint that hardly seems inequitable.

8. In New Hampshire the regulatory process balances the interests of ratepayers and investors by providing each what amounts to equal exposure to financial hardship. Risk of loss passes to consumers upon commercial operation in the same way that risk of loss passes upon receipt of goods in the

competitive market. Rates are then set by adding up costs, however high, and dividing by sales to obtain a rate. That end result, however expensive for ratepayers, is just and reasonable and consistent with FPC v. Hope Gas Co., 320 U.S. 591 (1944), regardless of its impact on anyone. Even so, only the law of diminishing returns will prevent a utility from charging rates so high as to actually loose sales or customers, (See Market Street R. Co. v. Comm'n, 324 U.S. 548, 565 (1945)), so we can modify our conclusion somewhat to say in New Hampshire the only real limit to rates for prudently spent investment is what the traffic will bear. Already, two major wholesale customers have had enough. See Re: PSNH, 31 F.E.R.C. para. 61,267 (1985); Re: PSNH, F.E.R.C. para. 61,251 (1985).

9. Given the foregoing just what then is an "exploitative" rate? If in New Hampshire , consistent with Hope, all the traffic will bear is permitted if Seabrook operates, we submit it is "exploitation" to allow the same end result if Seabrook does not operate and ratepayers receive nothing. Obviously if ratepayers can be charged all the traffic will bear whether a plant operates or does not operate the concept of an "exploitative" rate becomes utterly meaningless and the idea of regulation protecting ratepayers is a hoax. If that is what the law provides then the ratepayers need to be told forth rightly so the people can either change the system or adapt appropriately. But it is this Court who will have to tell the ratepayers, and before it can do so it will have to address the concept of "exploitative" rates. It cannot in all

fairness avoid answering that question if it takes this case since it is central to the concept of balancing.

Moreover, before this Court decides it can tell by direct observation alone that an "end result", separate from the process that produced it, is just and reasonable the Court should consider whether it can similarly tell when a rate is "exploitative". If it cannot do one, separate from the process, we submit it cannot do the other.

Although PSNH pays lip service to "balancing", it is the very last thing it wants this Court to consider. PSNH wants the Court to focus on its financial condition which PSNH considers the "end result". But actually the "end result" of

the New Hampshire process is a non-exploitative rate. "... [R]egulation does not insure that the business shall produce net revenues ...." FPC v. Nat. Gas. Pipeline Co., 315 U.S. 575, 590 (1942). (emphasis added). PSNH hopes the Court will conclude the process cannot possibly be balanced given PSNH's financial condition. But we submit that is like saying capitalism does not work because Braniff went under. Instead, the systems value is in allowing the failure.

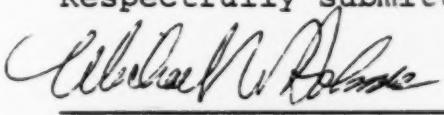
10. The OCA believes the Equity Committee's arguments have been made by Counsel of Record for the Company, and there is no need for independent representation. The Equity Committee was created on April 15, 1988, almost three months after the filing of the Chapter 11 petition, and it would appear

that its major, if not only purpose is to champion the prudency of the Seabrook investment, an issue which has not been decided despite the Committee's contentions to the contrary. See Amicus Brief at 4. While it arguably may not be "lax management" which is keeping the plant from commercial operation, it certainly was "lax management" that proceeded in the face of known risks and thereby bankrupted what is essentially a cost plus operation by putting its eggs in one basket and then putting the basket in the wrong place. See Re: PSNH, 14 N.R.C. 279 (1981), aff'd. Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1982).

WHEREFORE, on behalf of the residential utility consumers of the State of New Hampshire, the OCA requests that the Equity

Holders Motion For Leave To File Brief Amicus Curiae be denied and that any subsequent filings by Bankruptcy "Committees" denied.

Respectfully submitted,



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NO. 87-1613

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

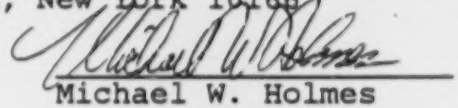
THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court Of
New Hampshire

CERTIFICATE OF SERVICE

I, Michael W. Holmes, a member of the Bar of this Court, hereby certify that on the 12th day of May, 1988, three copies of the Objection of Appellee, Michael W. Holmes, Consumer Advocate, to the Motion for Leave to File Brief Amicus Curiae and Response to Brief Amicus Curiae of the Equity Security Holders of Public Service Company of New Hampshire in the above entitled case were mailed, first class postage prepaid, to Thomas R. Jones, Esq., Attorney for Appellant, 80 Pine Street, New

York, New York, 10005, Larry M. Smuckler, Esq., Assistant Attorney General, Attorney for the State of New Hampshire, State House Annex, 25 Capitol Street, Concord, New Hampshire, 03301, Robert C. Hinkley, Esq., Attorney for Campaign for Ratepayer's Rights, 1838 Elm Street, Manchester, New Hampshire, 03104, Richard N. Tilton, Esq., Attorney for Equity Commitee, 200 Park Ave., New York, New York 10166.



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No. 87-1613

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Appellant,

—v.—

NEW HAMPSHIRE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

SUPPLEMENTAL BRIEF

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No. 87-1613

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

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ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

SUPPLEMENTAL BRIEF

This Supplemental Brief is submitted by Appellant Public Service Company of New Hampshire ("PSNH") pursuant to Supreme Court Rule 16.6 in further support of its pending Jurisdictional Statement filed on March 30, 1988 ("Jurisdictional Statement"). This Brief is submitted for the purpose of placing before the Court a Decision of the New Hampshire Supreme Court which was "not available at the time of [the March 30, 1988] filing."[1]

1 PSNH refers to its Statement Pursuant to Rule 28.1 contained in the Jurisdictional Statement.

Introduction

PSNH's Jurisdictional Statement sets forth the nature of this Appeal including *inter alia* the question presented (at i) and the Statement of the Case (at pages 3-12). In short, the Appeal raises the issue of whether the application of New Hampshire Rev. Stat. Ann. § 378:30-a (1984) (the so-called "anti-CWIP" law) deprives PSNH of due process and effects a taking of PSNH's property, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[2] The New Hampshire Supreme Court, in the Decision here on appeal,[3] stated that the statute does not have such an effect, stating that constitutional requirements could be met by allowing increased rates of return to reflect the increased risks caused by the anti-CWIP law.[4] This Supplemental Brief is submitted to call this Court's attention to the New Hampshire Supreme Court's subsequent Decision in *Appeal of Public Service Company of New Hampshire* (August 5, 1988)[5] in which that court refused to give effect to rights it purported to recognize in the Decision now on appeal.

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2 The Question Presented reads as follows:

> "Do New Hampshire Rev. Stat. Ann. § 378:30-a and the New Hampshire Supreme Court's application thereof denying utility investors any recovery of or on investment in electric generating plant fully constructed but not yet in service, effect a taking of property in violation of the Fifth and Fourteenth Amendments when the result is (1) to prohibit the state ratemaking agency from determining whether the appropriate balance between investor and consumer interests requires such recovery and (2) to bring about the bankruptcy of the utility?"

3 *Petition of Public Service Co.* (January 26, 1988)

4 PSNH showed at pages 20-25 of its Jurisdictional Statement that this conclusion is factually and conceptually baseless.

5 A copy of the Decision is annexed hereto as a Supplemental Appendix and cited as "Supp. App. _____."

Discussion

In the Decision now on appeal the New Hampshire Supreme Court stated that "*Hope* [*FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)] does guarantee a return *proportionate to the risk* . . ." (App. A. at 13a)[6] (emphasis added) and that "[t]he constitutional consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment *that reflects the risk that the [anti-CWIP] statute places upon them.*" (App. A. at 11a) (emphasis added) Thus the court's Decision seemed to recognize that investors were entitled to be compensated for the full risk of nonrecovery of prudent investment caused by the anti-CWIP law. In dictum, the New Hampshire court indicated its view that in the past "[t]he Company and its investors have received compensation for the risks they have assumed through an enhanced rate of return. . . ." (App. A at 12a)

However, the August 5 Decision makes clear that the New Hampshire court has in fact rejected the right of PSNH investors to compensation in a manner fully "proportionate to the risk" or in a manner "that reflects the risk that the statute places upon them."

In the rate case reviewed in that Decision, PSNH did not seek to place any of its Seabrook investment into rate base. Rather it sought a rate of return on common equity capital intended to reflect, in full, the unique risk which its Seabrook investment placed upon equity investors, in light of New Hampshire's anti-CWIP law. In support PSNH presented evidence showing that a rate of return on common equity of 19% was required to reflect its specific current risk.[7] (Supp. App. at 5a) In that regard, the New Hampshire Public Utilities Commission made the following finding:

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6 Citations are to the Appendices annexed to the Jurisdictional Statement.

7 As opposed to a 13.3% return which would reflect a general rate of return of utilities with nuclear plants under construction. (Supp. App. at 5a)

> " 'The Commission finds that the 19 percent return on equity [proposed by Rosenberg and Williamson] is one reasonable measure compensating the investor for all risks inherent in [the company].' " (Supp. App. at 6a) (brackets in original)

However, the Commission went on to say:

> " 'The Commission further finds that the 19 percent return on equity is a level of return that is generally out of line with a utility type of business and is the type of return of a highly profitable enterprise or speculative venture.' " (Supp. App. at 6a)

Instead, the Commission allowed a rate of return of only 15% to reflect only the risk of a "normal" nuclear constructing utility. As the New Hampshire Supreme Court noted:

> "The Commission proceeded to explain the difference between the normal utility's return and the 19% level by reference to the uncertainty that the Seabrook plant would ever operate and the corresponding doubt that the company would ever recover any of its Seabrook investment, equal to four times the value of its existing rate base." (Supp. App. at 6a)

Thus the Commission found that although the 19% rate of return was required to fully reflect the current risks caused by the anti-CWIP statute it chose instead to provide a lower rate, not fully reflective of those risks, believing the higher rate to be one associated with "speculative ventures."[8]

On appeal to the New Hampshire court, PSNH argued that that court's January 26, 1988 Decision (and *Hope*) entitled PSNH's investors to a rate of return " 'that reflects the risk that the [anti-CWIP] statute places upon them' ", *i.e.*, 19%. (Supp. App. at 7a) (brackets in original) Rejecting this argu-

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8 It must be emphasized that even if 19% had been granted as a current rate of return it would in no way compensate PSNH's investors for the taking which has occurred as a result of the application of the anti-CWIP law. *See* Jurisdictional Statement at p. 21; note 20.

ment, the New Hampshire court concluded that "the language quoted from [the Decision now on appeal in the United States Supreme Court] does not purport to be a complete statement of the relevant law. . . ." (Supp. App. at 7a)

The court then imposed a new limitation, stating that "a utility has no constitutional right to returns commensurate with 'highly profitable enterprises or speculative ventures.' " (Supp. App. at 9a, quoting from *Bluefield Water Works and Improvement Co.* v. *Public Service Co.*, 262 U.S. 679, 692 (1923))[9] The New Hampshire court summarized as follows:

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9 The court's reliance on *Bluefield* as a limitation upon the constitutionally required ratemaking process is misplaced. Immediately following the language quoted by the New Hampshire Supreme Court, this Court's opinion went on to say:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." (262 U.S. at 693)

This is all that PSNH asked for in its emergency rate case now on appeal.

Furthermore it is a plain misinterpretation of *Bluefield* to suggest that it allows or compels disregard of the specific risks of investing in the subject utility, where those risks are somehow seen to be "speculative."

Placed in proper context, the full passage from *Bluefield* on which the New Hampshire Supreme Court relied reads as follows:

> "What annual rate [of return] will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." (292 U.S. at 692-93)

Thus the context demonstrates *Bluefield*'s teaching that *all* relevant facts are to be taken into consideration in setting a rate of return, and none is to be arbitrarily excluded. It also contains a clear requirement

"The implication, of course, is that *utilities and their investors are responsible for controlling risks*, and while the probability of suffering the consequences of a risk may grow to the point where only a speculator would accept it, ratepayers need not support a utility's capital with premiums that a speculator would demand.

"The dispositive significance of this *limitation on the company's constitutional entitlement* is apparent once we recall that the commission found not only that 19% was what the equity investor would require, but that 'the 19% return . . . [was] the type of return of a highly profitable enterprise or speculative venture.' . . . Because 19% was an appropriate return on stock that was only a speculative investment, it does not follow that the company was entitled to 19%." (Supp. App. at 9a-10a (emphasis added)[10]

Moreover the court was not content with rejecting PSNH's entitlement to a 19% rate. Rather, it gratuitously proceeded to question the appropriateness of even the 2% premium which the Commission had granted, finding that "[w]hatever the 2% represented, it could not have been found on this record to measure the incremental risk *inherent* in nuclear construction." (Supp. App. at 10a) (emphasis added) This conclusion makes

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that the return be equal to investments "attended by corresponding risks and uncertainties," the same requirement noted in *Hope* at 603 and by the New Hampshire Supreme Court in the Decision here on appeal. (App. A at 10a)

Moreover, in full context the passage neither suggests nor requires that the specific risk of the subject utility is to be disregarded in establishing a return on common equity. The caution about highly profitable enterprises or speculative ventures relates only to the weight to be given to returns from such businesses which might be offered for purposes of comparison in setting a rate of return.

10 The court's suggestion "that utilities and their investors are responsible for controlling risks" is particularly disingenuous in light of the fact that the "risk" of the anti-CWIP law was legislatively imposed after PSNH began construction of the Seabrook Project.

absolutely clear that PSNH has never been, and in the New Hampshire Supreme Court's view is not entitled to be, compensated for the specific and unique risks which the anti-CWIP law actually imposed on it, as distinguished from industry-wide risks inherent in nuclear construction. Yet, it was those specific risks which brought PSNH to a position where it was foreclosed from the financial markets, unable to attract capital and ultimately driven into bankruptcy.

In short, the recent decision of the New Hampshire Supreme Court makes plain the New Hampshire court is not in fact prepared to recognize the "constitutional consequences" of the risk allocation mandated by New Hampshire's anti-CWIP law, but instead has imposed new limits on recognizing the extraordinary risks imposed by that law, regardless of what PSNH's financial integrity may require.

Conclusion

The recent Decision demonstrates that the New Hampshire Supreme Court does not in fact accord the "constitutional consequences" it noted in the decision at issue in the pending appeal, and further discredits the New Hampshire court's *dictum* that PSNH has been fully compensated for risk in the past. Thus, even if "enhanced rates of return" were somehow a complete answer to the "end result" balancing mandated by *Hope* (and we submit it is not) the New Hampshire court has now made clear that it does not recognize any constitutional right to such returns, even where shown to be necessary to compensate investors for the risks caused by the anti-CWIP statute and thereby to attract necessary capital.

Rather than recognizing financial integrity as an end result mandated by *Hope*, the New Hampshire court has created a classic "Catch 22": if the risks generated by the anti-CWIP law become so high that only "speculative" investors can be attracted, the return demanded by such investors is not to be

allowed, precisely because it would be a "speculative" return. This formulation assures that adequate capital will not be forthcoming, in disregard of the end result prescribed by *Hope*. As applied to PSNH, it assured insolvency.

Probable jurisdiction should be noted.

Respectfully submitted,

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November 17, 1988

SUPPLEMENTAL APPENDIX

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NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter. Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission
No. 87-334

APPEAL OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
(New Hampshire Public Utilities Commission)

August 5, 1988

Sulloway Hollis & Soden, of Concord and *Catherine E. Shively*, of Manchester (*Martin L. Gross* and *Ms. Shively* on the brief, and *Mr. Gross* orally), for Public Service Company of New Hampshire.

Michael W. Holmes and *Joseph W. Rogers*, of Concord (*Mr. Holmes* and *Mr. Rogers* on the brief, and *Mr. Holmes* orally), for the Office of the Consumer Advocate.

Stephen E. Merrill, attorney general, and *Martin C. Rothfelder*, Public Utilities Commission General Counsel (*Monica A. Ciolfi*, attorney, and *Mr. Rothfelder* on the brief, and *Ms. Ciolfi* orally), for the State, as amicus curiae.

SOUTER, J. In this appeal from a rate order of the public utilities commission, the utility assigns error in setting the rate of return on common equity capital, and in recognizing an addition to the accumulated deferred tax account by a greater amount with respect to the test year than the total deferred taxes projected annually for collection from ratepayers. We affirm.

On May 29, 1986, the Public Service Company of New Hampshire began proceedings before the public utilities commission under RSA chapter 378, to obtain authorization for increasing rates charged to customers for electricity. Although the rates originally proposed would have produced an annual revenue increase expected to be nearly $59 million, the enactment of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, prompted the company to reduce its request to provide for an increase of something under $39 million.

After hearings were completed on June 29, 1987, the commission issued order No. 18, 726 in its docket DR 86-122, authorizing rates sufficient to generate an additional $20.5 million to be collected by billing customers during a period beginning July 1, 1987. The commission issued a further report and order No. 18, 775 on the company's motion for rehearing under RSA 541:3, whereupon this appeal followed under RSA 541:6. Between the filing of the appeal and argument, the commission transferred questions of law that had arisen on a subsequent and independent request for rate increases, to which we responded by sustaining the constitutionality of the anti-CWIP statute, RSA 378:30-a, as reported in *Petition of Public Service Co. of New Hampshire*, 130 N.H. ____, 539 A.2d 263 (1988). Following this decision, the company filed a petition in the United States District Court for the District of New Hampshire seeking protection under the bankruptcy act, 11 U.S.C. § 1101 *et seq.*

The company's burden in this appeal is imposed by RSA 541:13, under which we "will not sustain [the] appeal, except for errors of law, unless [the utility] demonstrates by a clear preponderance of the evidence that the [commission's] decision was unjust or unreasonable or reflects an abuse of [the commission's] discretion." *Appeal of Granite State Electric Co.*, 124 N.H. 144, 146, 467 A.2d 252, 253 (1983). The company's

efforts to carry this familiar burden can be evaluated best in light of some equally familiar standards of public utility rate-making.

In setting rates, a regulatory commission follows a process of identifying consumer and producer interests competing for recognition, with an ultimate goal of striking a fair balance or accommodation between them, to be reflected in charges to customers that may be described as just and reasonable both to the customer and to the utility. *See* RSA 378:27, :28; *Appeal of Conservation Law Foundation*, 127 N.H. 606, 633, 638, 507 A.2d 652, 671, 674 (1986). Because there is no one single point at which the balance must necessarily be struck in order to achieve a just accommodation, it is said, in conclusory terms, that a utility's charges to customers are appropriate if they fall within a zone of reasonableness between the extremes of confiscating a utility's property, at one end, and exploiting customers for the utility's benefit, at the other. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968); *Petition of Public Serv. Co. of N.H.*, *supra* at ____, 539 A.2d at 268.

The conceptual structure in which a regulatory commission attempts to achieve this result equates the total revenue to be raised by rates charged to customers with the sum of approved operating expenses plus an amount computed by applying a percentage rate of return to the depreciated value of the company's rate base, comprising its investment in property used and useful in the production of energy for its customers. *See* RSA 378:27; *Appeal of Conservation Law Foundation*, *supra* at 633-34, 507 A.2d at 671.

Of the formula's three variables, operating expense, value of rate base and rate of return, only the last is a matter of concern in dealing with the first issue in this appeal. The objectives of setting a reasonable rate of return on a utility's rate base, *see* RSA 378:27, :28, include compensating the company's investors for the risks they assume when they lend to the company and buy its stock. *See, e.g., Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 603 (1944); *Petition of Public Serv. Co. of N.H.*, 130 N.H. at ____, 539 A.2d at 269. The anti-CWIP statute, for example, places the entire risk of loss from an uncompleted plant on the company's investors, *Petition of Public Serv. Co.*

of N.H., 125 N.H. 595, 484 A.2d 1139 (1984), and the same is true when a plant has been completed but never placed in operation, *Petition of Public Serv. Co. of N.H.*, 130 N.H. ____, 539 A.2d at 267-68. The "constitutional consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them." *Id.* at ____, 539 A.2d at 269.

This general standard has been reflected over the years in the rule that a utility's threshold entitlement is to a rate of return equal to the cost of capital. *See, e.g., Power Comm'n v. Hope Gas Co., supra* at 603; *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 692 (1923); *Appeal of Conservation Law Foundation*, 127 N.H. at 635, 507 A.2d 672; *Company v. State*, 95 N.H. 353, 361, 64 A.2d 9, 16 (1949). The cost of capital is understood to be what "a utility must receive to maintain its credit, to pay a return to the owners of the enterprise, and to insure the attraction of capital in amounts adequate to meet future needs." C. Phillips, Jr., *The Regulation of Public Utilities* 346 (1985); *see also S.W. Tel. Co. v. Pub. Serv. Comm.*, 262 U.S. 276, 306 (1923) (Brandeis, J., dissenting); *New Eng. Tel. & Tel. Co. v. State*, 104 N.H. 229, 234, 183 A.2d 237, 241 (1962). Any overall capital cost must necessarily be a weighted average of the costs of the various debt and equity components of the utility's capital structure, *see Appeal of Conservation Law Foundation, supra* at 635, 507 A.2d at 672, with the consequence that in a rate proceeding the cost of each such component must be separately identified. It is in focusing on the cost of the company's common equity capital that the first issue arises in this appeal.

Three witnesses addressed the cost of common equity as of the time of the rate hearing. The commission staff presented Dr. Sarah Voll, who employed a discounted cash flow (DCF) methodology to compute the cost of common equity for thirty-five utilities, about half of which were constructing or had completed nuclear plants. Based on these computations, Voll's opinion was that the appropriate cost of common equity might range from 11.63% to 13%, with the higher rate applicable to utilities building or employing nuclear powered generators. She also testified about the character of the company's stock as an investment, and her judgment was that the company "can be

characterized as a speculative venture as long as reputable investment services such as Value Line contain statements [as of September 26, 1986] like 'This stock is best avoided by all but the most speculative of accounts.' " She stated flatly that "[i]nvestors who purchase Public Service's stock in hopes of realizing a substantial capital gain are in fact speculating."

The company presented two witnesses on the issue, Robert Rosenberg and J. Peter Williamson, who agreed that the DCF methodology could not be applied directly to value the company's stock, since the company was paying no dividend. Rosenberg applied DCF to thirty utilities with nuclear plants under construction, from which he derived an average common equity cost of 13.3%. He then compared the risks represented by the sample stocks with the company's risks, which he found higher for reasons that included uncertainty over the outcome of Seabrook licensing proceedings. He concluded that the higher risk indicated a real equity cost of 19% for the company. Williamson reached the same result based on inferences drawn from comparing yields on the company's capital instruments with yields on a broad market sample.

The commission accepted neither Voll's 13% benchmark nor Rosenberg's and Williamson's 19%. It apparently viewed Voll's upper limit as inadequate to reflect the company's risks, and accordingly added premium equal to the difference between the upper limit of common equity cost revealed by Rosenberg's market sample, *i.e.*, 13.3%, and the figure of 11.43%, identified as the average common equity cost computed by the Federal Energy Regulatory Commission (FERC) on a sample of diverse companies, including those with nuclear plants under construction. The commission rounded this difference of 1.87% up to an even 2%, which it added to Voll's upper limit of 13%, and thus set a rate of return on common equity of 15%.

The company contested this figure without success in its motion for rehearing. While much of the commission's response to the company's challenge had to do with articulating constitutional ratemaking requirements, which we will address below, two of the commission's factual conclusions deserve attention.

> "The Commission finds that the 19 percent return on equity [proposed by Rosenberg and Williamson] is one reasonable measure compensating the investor for all risks inherent in [the company]. The Commission further finds that the 19 percent return on equity is a level of return that is generally out of line with a utility type of business and is the type of return of a highly profitable enterprise or speculative venture."

The commission proceeded to explain the difference between the normal utility's return and the 19% level by reference to the uncertainty that the Seabrook plant would ever operate and the corresponding doubt that the company would ever recover any of its Seabrook investment, equal to four times the value of its existing rate base.

Although the company argues here as well that the order setting the common equity return at 15% is reversible for an error of law, identifying the error as the company conceives it requires some care, for there are three separable strands in the line of the company's thinking. First, the company argues that the commission failed to consider those components of risk that were peculiar to the company, that is, those resulting from the Seabrook investment, which have impelled the company into bankruptcy since the date of the commission's order. Second, the company argues that the commission has patently failed in its duty to articulate a methodology and findings to support the specific result it reached. The company notes that fulfillment of these obligations of administrative law are essential for any significant judicial review of rate orders, which depend for their validity upon the integrity of the reasoning process by which a series of relevant competing factors are evaluated in relation to each other. *See, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. at 792 ; *Company v. State*, 95 N.H. at 357, 359, 64 A.2d at 14, 15. Finally, the company argues that on the findings and record before us, as a matter of law the only supportable result is a return on common equity of 19%. The company has expressed this last view through its prayer that the case be remanded "with instructions that the rates allowed to [the company] in

this case be adjusted to reflect a return on common equity capital of 19%."

The first and second of these supposed legal errors can be eliminated, however. It seems clear to us that the company does not rest its request for relief on the commission's claimed failure merely to consider risks peculiar to the company. Far from ignoring the risk factors flowing from the Seabrook investment, the commission obviously had them very much in mind; it simply refused to conclude that they entitled the company to a 19% rate of return.

It is equally clear that the company would not have us predicate any relief on the commission's claimed failure to articulate its methodology and findings better than it did. At oral argument, the court showed some inclination to agree that the commission's reasoning might be insufficiently clear and suggested through questions that a remand might be in order. At the close of the argument, however, the company's counsel was candid in saying that the commission's failure to recognize compensable risk was clear from the record, and he urged the court not to remand for a more articulate elucidation of what the commission meant to be doing.

That leaves the third view of legal error, that the company is entitled as a matter of law to 19%, which this court is asked to instruct the commission to allow. The company rests this position on two premises: (1) *Hope* and our recent opinion in *Petition of Public Service Co. of N.H.* recognize a constitutional mandate to compensate the company's investors with a return "that reflects the risk that the [anti-CWIP] statute places upon them," *Petition of Public Serv. Co. of N.H.*, 130 N.H. at ____, 539 A.2d at 269; and (2) the commission found, as stated in the rehearing order, that "the 19 percent return on equity is one reasonable measure compensating the investor for all risks inherent in" the company. The company views these as the major and minor premises of a syllogism demonstrating a constitutional entitlement to 19% on common equity.

The syllogism is only as sound as its premises, however, and the language quoted from *Petition of Public Service Co. of N.H. supra* does not purport to be a complete statement of the relevant law, any more than the quoted finding on rehearing

states all of the relevant facts. Once the law and the facts are adequately accounted for, the company is left in no position to demand 19% as a matter of law.

There are two flaws in the legal component of the company's argument. The first is the assumption that 19% as "one reasonable measure" of risk must as a matter of law be the only reasonable measure. But as we have already seen, what is reasonable in ratemaking can not be pinpointed. There is a range of what is reasonable, and from the commission's finding it would not follow that 19% was anything more than one point in the range.

The company's second erroneous assumption is that *Hope* and *Petition of Public Service Co. of N.H. supra* hold that a rising probability that risk will be realized must be followed indefinitely by a rising rate of return to the investor upon whom the loss may fall. On the company's reasoning, an equity investor's entitlement to 19% at the time this petition was heard would have grown, for example, to an entitlement to 34% by the time the commission transferred the questions that led to our opinion in *Petition of Public Service Co. of N.H.* for such was computed to be the consequence of the company's need for revenue on its existing rate base by the summer of 1987. *Petition of Public Service Co. of N.H.*, 130 N.H. at ____, 539 A.2d at 266. Such logic, indeed, would provide the investors not with a reasonable rate of return but with plenary indemnification, for the ultimate consequence of automatically raising the return as the prospects for recovering the investment fell would be nothing less than a shifting of the entire risk from the investors to the ratepayers.

It is needless to say, as we held in *Petition of Public Service Co. of N.H.*, that *Hope* is no authority to require such shifting of risk after risk has materialized, *Petition of Public Serv. Co. of N.H.*, *supra* at ____, 539 A.2d at 269, nor is it authority for indefinitely augmenting return up to the moment of an increasingly probable disaster. Providing such an upward spiral of return would, indeed, represent a patent failure to weigh the interests of the customers in the balancing process. *See Appeal of Conservation Law Foundation*, 127 N.H. at 636, 507 A.2d at 672. The company's view thus runs counter to the settled law

that a regulated utility has no abstract constitutional right to make a profit, *Power Comm'n v. Hope Gas Co.*, 320 U.S. at 603; *Power Comm'n v. Pipeline Co.*, 315 U.S. 575, 590 (1947), and no right to the rehabilitation of financial integrity that market forces have hopelessly undermined, *Market Street R. Co. v. Comm'n*, 324 U.S. 548, 566 (1945).

Having said that, we also have to recognize that there is no constitutional or other basis for holding the commission to be without authority to increase a rate of return, once a utility's plans are understood to carry a more onerous risk than originally perceived. The relationship between investors and ratepayers is not static, and regulators must at least consider restriking old balances between the competing interests as conditions change. And although the difficulty lies in recognizing where legitimate adjustment ends and impermissible risk-shifting begins, there is at least one general rule that effectively answers the company's position in this case. The source of that rule is an opinion antedating *Hope* by twenty years.

Hope was not the first case to hold that risks undertaken by a regulated utility should be compensated by returns commensurate with similar risks in other businesses, for that standard had found effective articulation in *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 692 (1923). In *Bluefield*, however, the Court stated not only this measure of a utility's entitlement, but also the limit of a utility's legitimate claim, in holding that a utility has no constitutional right to returns commensurate with "highly profitable enterprises or speculative ventures." *Id.* at 693. The implication, of course, is that utilities and their investors are responsible for controlling risks, and while the probability of suffering the consequences of a risk may grow to the point where only a speculator would accept it, ratepayers need not support a utility's capital with premiums that a speculator would demand.

The dispositive significance of this limitation of the company's constitutional entitlement is apparent once we recall that the commission found not only that 19% was what the equity investor would require, but that "the 19% return . . . [was] the type of return of a highly profitable enterprise or speculative venture." To support this conclusion it had, of course, not only

the surveys indicating generally lower returns in the nuclear power industry, but also Voll's explicit expert testimony reflecting widely disseminated investment opinion that the company's common stock was a speculative vehicle. Because 19% was an appropriate return on stock that was only a speculative investment, it does not follow that the company was entitled to 19%.

While this disposes of the company's call for remand with instructions to order a 19% return on equity, some further observations on the commission's treatment of the issue are nonetheless in order. It will be recalled that the commission set the 15% rate of return by adding 2% to the upper end of the range disclosed in Voll's sample. The 2% represented the difference, rounded off, between the upper limit of the returns listed in Rosenberg's sample of companies with nuclear generating plant construction, and the average return shown in the broad FERC sample.

The commission explained that it added the 2% to Voll's high number in order to compensate the company for the risk of its "nuclear construction program[ ]." This stated reason is rationally inadequate. As Commissioner Aeschliman pointed out in her dissent, the upper figure in the Voll sample represented a return to companies with nuclear plants under construction; there was no ground to add anything more simply for the risk of nuclear construction already reflected at Voll's 13%. Nor, for that matter, did the difference between the FERC average and Rosenberg's 13.3% even represent the difference between returns for companies without nuclear plants and those with them, since the FERC sample itself included companies with nuclear generators. Whatever the 2% represented, it could not have been found on this record to measure the incremental risk inherent in nuclear construction. The company, naturally, seeks no relief on the basis of these methodological deficiencies, and the company is the only party seeking relief. But the deficiencies are there, and they indicate the need for more critical scrutiny by the commission in the future.

The company's second assignment of error goes to the commission's treatment of the effect on the value of the company's rate base of deferred federal income taxes accumulated during the test year. Because the company's financial accounting for

ratemaking purposes may be different from its tax accounting, the company is customarily allowed to charge customers for tax expenses prior to the actual accrual of the company's tax liability. The classic example of this practice cited by the parties in the instant case occurs when allowable tax expense is calculated on the assumption of straight-line depreciation, but taxes are accrued and paid on the basis of accellerated depreciation. The resulting funds collected from customers and held for later payment of taxes as they accrue are known as deferred taxes.

To compensate the customers for a utility's advantage in holding such free funds, the commission requires the utility to deduct the total of accumulated deferred taxes from the value of the rate base. The result is a decrease in rate base as deferred taxes are collected and an increase as the tax liability accrues and the utility pays the tax.

Changes in a utility's tax rate, other things remaining equal, will in obvious ways modify the results of charging customers for deferred taxes. If, for example, the tax rate falls, the amounts of taxes deferred will fall along with the total tax burden, and accumulated deferred taxes will thereafter diminish the rate base by a lesser amount than would have been the case under the old, higher tax rates. When, however, such a change in tax rate occurs shortly before a ratemaking proceeding, unusual problems can arise in reflecting the effects of deferred taxes and accumulated deferred taxes among the items included in so-called test year data.

The concept of the test year provides a methodology for predicting a utility's future revenue requirement based on past experience. A regulatory commission selects a representative year as a model of the company's operation, on the basis of which it hopes to predict future performance. *See New England Tel. & Tel. Co. v. State*, 113 N.H. 92, 95-96, 302 A.2d 814, 817 (1973).

The model, however, is destined to be imperfect. Often enough, even before the ratemaking proceeding has begun, elements of income and expense are known to have changed from their levels in the test year, and the commission must then decide whether to modify the test year data in order to obtain a more accurate prediction. One commentator has observed that

" '*[p]hilosophically, the strict test year assumes the past relationship among revenues, costs, and net investment during the test year will continue into the future.*' To the extent that these relationships are not constant, the actual rate of return earned by a utility may be quite different from the rate allowed by the commission. For many years, commissions have adjusted test-year data for 'known changes,' *i.e.*, a change that actually took place during or after the test period . . . ." C. Phillips, Jr., *The Regulation of Public Utilities* 182 (1985) (footnotes omitted) (emphasis in original); *see Appeal of Manchester Gas Co.*, 129 N.H. 800, 806, 533 A.2d 366, 370 (1987) (commission may limit recognition of changes to those occuring within twelve months of test year's end, in order to conform to matching principle that adjustments should include both revenue and expense changes). Thus, the test year data are modified to conform to actual experience, for the sake of furnishing the most accurate possible prediction of the utility's fortunes in the period following the rate order.

In the proceeding now before us, the commission selected a test year ending September 30, 1985, one consequence of which was that the historical data failed to reflect the decrease in the rate of the company's federal income taxation provided by the Tax Reform Act of 1986. The company therefore proffered two adjustments to the test year data (and to its own submission to the commission, which had been prepared using the old tax rate). It proposed to decrease its claimed operating expense for deferred taxes. And it proposed to decrease by a like amount the test year addition to accumulated deferred taxes, with the result that the average deduction from the test year rate base would likewise be decreased. The object of the first proposal was to reduce an operating expense to be charged to customers; the object of the second was to increase the average test year rate base, and to increase revenues accordingly. The commission accepted the first proposal but declined the second.

The company claims the latter decision was erroneous and describes it as violating double entry bookkeeping concepts, as well as the matching principle of recognizing both revenue and expense changes to test year data. What the company overlooks, however, is that the commission was not prescribing

bookkeeping methods; it was adjusting test year data to conform to known fact, and in so doing it accurately reflected known fact in each instance.

The tax rate fell after the close of the test year, resulting in lower projections of deferred tax expense under financial accounting principles for the period to be covered by the rate order. The commission therefore properly adjusted the test year deferred tax expense item to reflect the effect of the tax law change on the company's future taxation. The commission thus recognized that a future event would be different from corresponding events in the past and modified the data to reflect this known and predictable difference.

Because, however, the lower tax rate had not in fact applied to the period selected as the test year, the company had actually received revenue representing deferred taxes computed at the higher rate then in effect, and the company had increased its accumulated deferred taxes by that amount. Having thus collected enough money to satisfy its anticipated tax burden at the old, higher rate, the company ended up with more money than it would need to pay the taxes that would accrue at the new, lower rate. Consequently, the company had the use of the excess along with all of the other funds represented by the accumulated deferred tax account, and it would continue to benefit from the favorable consequences of holding that excess until it should be drawn down in a manner prescribed by the commission (a matter that is not before us). If, therefore, the commission had decreased the figure indicating the test year addition to accumulated deferred taxes and had set rates accordingly, the commission would not have given customers credit for a portion of deferred tax expense they had actually paid during the historical test year.

To have done as the company requested, the commission would have lost sight entirely of the reason for permitting changes to test year data, which is not to falsify the past, but to increase the accuracy of predicting the future. Thus, test year data is properly modified to reflect changes that will predictably cause future experience to differ from past experience, *e.g.*, in the rates at which employees are paid or taxes collected. But test year data may not be modified to pretend that past experience

with predictable effects on the future did not occur, *e.g.*, that deferred taxes were accumulated in different amounts from those actually shown on the books. The company's second proposal would have falsified the past and would have produced a false prediction of the company's future revenue need, by pretending the company would not enjoy the benefit of some revenue it had in fact collected.

Nothing, of course, in the commission's order assumes that the company will continue to add to accumulated deferred taxes at the old rates. Its deferred tax expense will be computed at the new rates, as will its annual additions to the account for accumulations. The order merely assumes, correctly, that the company will benefit from holding what we have called the excess, which it actually received. In setting the company's rate of return on that assumption, the commission acted true to the facts.

We are aware of at least three other regulatory agencies that have taken the same position. *See Re Carolina Power & Light Co.*, 87 P.U.R. 64, 104-05 (1987); *Pennsylvania Public Utility Comm. v. Pennsylvania Power Co.*, 85 P.U.R. 4th 323, 380-81 (1987); *Re Potomac Electric Power Co.*, 83 P.U.R. 4th 219, 229-30 (1987). It would be surprising to find contrary authority, of which the company has cited none.

Affirmed.

All concurred.